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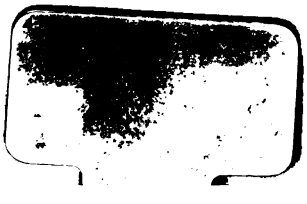

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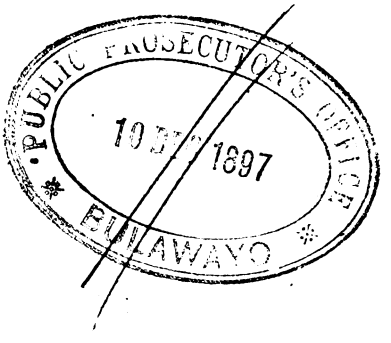
PUBLIC PROSECUTOR'S OFFICE
1897
BULAWAYO

CASES

DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE

DURING THE YEARS

1853—1856,

WITH TABLE OF CASES AND ALPHABETICAL INDEX.

EDITED BY

M. W. SEARLE, B.A., LL.B. (CANTAB.);

BARRISTER-AT-LAW OF THE INNER TEMPLE, AND ADVOCATE OF THE SUPREME COURT.

VOL. II.

CAPE TOWN:

J. C. JUTA AND CO.

1886.

JUDGES OF THE SUPREME COURT

DURING THE YEARS

1853-1856.

WYLDE, C. J. [retired Oct., 1855].
MUSGRAVE, J. [died Oct. 6, 1854].
BELL, J.
EBDEN, J. [appointed Oct. 7, 1854: on sick leave from Oct., 1855.]
CLOETE, J. [appointed Nov. 3, 1855, on retirement of WYLDE, C. J.].
WATERMEYER, J. [appointed Acting Puisne Judge Oct. 13, 1855].

Attorney-General.
W. PORTER.

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CASES

DECIDED

IN THE SUPREME COURT.

ROWLES *vs.* MASKELL AND POTE.

Promissory Note.—Cession.—Endorser.—Costs.

The plaintiffs were holders of a promissory note made by W. in favour of S.; it was endorsed by defendants, and below their endorsement was that of S.; the plaintiffs alleged that S. had ceded the note to them; it had never been negotiated. After excussion of W., who surrendered, the plaintiffs proceeded against defendants as sureties for the amount of the note and costs incurred in proceeding against W.; judgment was given for the amount of the note, but the question of costs incurred against W., postponed.

1853.
Feb. 3.

Rowles vs. Pote.

This case was removed from the Circuit Court of Albany, where it was heard on October 2, 1850. The summons in the Circuit Court was against John Maskell and Charles Pote, late co-partners, trading as Maskell and Pote, merchants and auctioneers, of Graham's Town, which firm had been dissolved, and called upon one or other of them (one paying the other to be absolved) to pay £30 with interest from July 24, 1847, due by virtue of a promissory note for £30, dated April 24, 1847, made by one William Wathall at three months, in favour of one Alfred Solomon or order, and endorsed by the defendants as Maskell and Pote as sureties, during the partnership; the note had been endorsed in blank by Solomon, and delivered to the plaintiff, who was now the legal holder. When the note became due Wathall

1853. Feb. 3. Rowles vs. Pote.

could not pay, and notice was given to defendants. On May 2, 1850, the plaintiff obtained provisional sentence in the Supreme Court against Wathall, and on execution being taken out the sheriff made a return of *nulla bona*, whereupon the defendants became liable for the amount as sureties; and further prayed that defendants pay the sum of £8 0*s*. 7½*d*., being taxed costs, in the suit against Wathall, or deny their signature on the note. The defendants excepted to this summons: 1st. On the ground that it disclosed an illiquid claim, for which provisional sentence could not be given. 2nd. That it disclosed no right of action entitling the plaintiff to sue, for the note having been made payable to Solomon, the names at the back of defendants and of Solomon are not to be considered as endorsements in blank, and as being such, transferring a right of action to a holder without cession, but the sole party entitled to sue is the original payee, the note having never been negotiated. The note was as follows:—

Due 24th July, 1847.

Graham's Town, April 24, 1847.

£30 0 0.

Three months after date I promise to pay to Mr. Alfred Solomon or order the sum of £30 for value received.

(Signed) W. WATHALL.

(Endorsed) MASKELL & POTE.
ALFRED SOLOMON.

The note had never been negotiated. The plaintiff withdrew the case against Maskell; the defendants admitted the excussion of Wathall, the principal debtor, also that the endorsement "Maskell and Pote" was in Maskell's handwriting; it was also admitted that the partnership was now dissolved. The plaintiff proved that before the dissolution, and on the day the note fell due, it was presented to both Maskell and Pote personally. Pote appeared astonished when he saw the note, and said to Maskell, "Good God, how could you do it?" Pote refused to pay. Evidence was also given that the note had been presented to Maskell at his country house; he did not pay it, and said that Wathall had come and told him to endorse "Maskell and Pote" on the note; Wathall at the time of presentment to defendants lived at Cradock.

This closed the plaintiff's case; the defendants called no

witnesses, and the Judge removed the case for judgment to the Supreme Court, to decide the question as to whether the plaintiff had given legal proof of claim upon the defendants.

1853. Feb. 3. — Rowles vs. Pote.

Porter, A.G., for the plaintiff, contended that although the defendant's endorsement, simply of their names, stood on the back of the note above the name of the payee, yet the signature showed, as confirmed by the evidence, that they became sureties for the honour of the drawer, now insolvent.

Watermeyer, for defendant Pote, argued that as the first endorser was not the original payee, the title was not legally derivable. Sureties should not be placed in a worse position than endorsers. There was also no evidence that when the note was presented to defendants it had been presented to Wathall, who lived at Cradock.

[*Story on Promissory Notes*, § 133, was referred to.]

THE COURT gave judgment for the plaintiff for the amount of the note with costs, but postponed the question of the £8 incurred as costs against Wathall for further hearing.*

[Plaintiff's Attorneys, J. & H. REID.
Defendant's Attorneys, REDELINGHUYS & WESSELS.]

HOETS *vs.* DE SMIDT.

Partition of Immovable Property.—Sale.—Bonus.

As to whether one of two parties equally interested under a will, in certain immovable property, can compel a partition, the other being anxious for a sale with bonus (not decided).

1853. May 31. — Hoets vs. De Smidt.

This was an action for relief against a sale with "strykgeld" or bonus or for partition of certain properties equally between plaintiff and defendant. The declaration stated that the plaintiff was appointed sole and universal heir under the will of his late mother, Mrs. De Smidt, who was

* The case does not appear to have been mentioned again.

1853.
May 31.

Hoets vs. De Smidt.

married, in community of property, to the defendant. The plaintiff and defendant were therefore equally interested in certain immovable property; that the shares in the said property were undivided, and that unless by selling the same and dividing the purchase money or otherwise by partitioning the same respectively by metes and bounds into two equal parts, it will not be possible for plaintiff and defendant to enjoy separately and individually their respective interests in the said properties; that it was admitted that the plan of selling by public sale will be more for the interest of plaintiff and defendant than partition by metes and bounds; that the plaintiff is ready to concur in a sale, but the defendant will not consent except by "stryk-geld" and bonus. The plaintiff objects to this manner of sale as being of a gambling character, and has required defendant to sell to the highest bidder, or by the rise and fall, or otherwise to consent to a partition of the properties whereby each of them would be at liberty to dispose of his own share as he thinks fit. Wherefore the plaintiff prays that it may be declared that the plaintiff is not bound to concur in the sale by "stryk-geld," and that a sale may be ordered to take place by auction; or otherwise that a just and fair partition may be made, and that all necessary deeds may be directed to be executed, or that one be ordered to pay to the other, &c.

The defendant pleaded—

1st. The general issue except as to joint interest.

2nd. That the properties admit of no fair partition without injury to defendant, and that the plaintiff by the law of the Colony is entitled to a sale of the whole property.

3rd. That a sale by "stryk-geld" and bonus is the usual and customary mode of sale, and is legalised by law.

Porter, A.G. (with him *Watermeyer*), for the plaintiff. This is a novel case. The question is the same as would have arisen between the testatrix and defendant. See *De Groot Inleid*, bk. 3, ch. 28 (8), p. 272; *Voet*, 10–2–22, 23; and 10–3–3.

Brand, contrà.—There is no declaration for partition; the real question is as to the bonus. Grounds should be shewn for a partition: the proper course is sale by public auction. See *Grotius, Introd.* (3, 28, 8, n. 20).

1853. May 31.

Hoets vs. De Smidt.

Porter in reply referred to 2 *Burge*, p. 676, as to the right of co-proprietor to partition.

[BELL, J., referred to *Turner* v. *Morgan*, 8 Ves. Jun. p. 143, as to partition before sale.]

[The following authorities were referred to: 2 *Starkie on Evidence*, p. 882, and note; *Meadows* v. *Tanner*, 5 Madd., p. 34; *Matthaeus de Auct.*, bk. 1, ch. 1, p. 4 (De Verb Signif.). "*Premium vero quod datur augenti pretium, Belgis trekgeld, strykgeld, proprium nomen apud Latinos vix habet;*" 2 *Burge*, p. 679: "But if the subject do not admit of being divided without injury &c:" and p. 680, "Costs of suit by partition out of the estate unless it has been incurred on account of the co-heirs."]

By consent of the parties THE COURT ordered that the defendant and plaintiff should each take certain of the property at a valuation agreed upon; and that the difference in value should be paid into the joint estate, from which estate costs of the application were to be paid.

[Plaintiff's Attorney, J. & H. REID.
Defendant's Attorneys, REDELINGHUYS & WESSELS.]

CROZIER *vs.* BROWNE.

Owner of Ship.—Registration.—Attachment by Edictal Citation.

Where the registered owner of a vessel had been duly summoned by edictal citations, which had been personally served, and made no appearance, the Court refused to take notice of a fact put in evidence that the ship had been sold by him by bill of sale, and that there was an endorsement on the Custom House Registry of the ship's port to that effect: it appearing that there was some evidence of collusion between him and the purchaser.

1853. June 14.

Crozier vs. Browne.

The plaintiffs were M. Crozier and J. S. Crozier, trading in Cape Town and at Liverpool as Crozier Brothers, and the defendants were Thomas Browne, of Bucklersbury, London, and Elizabeth Browne, of Amble House, in county of Northumberland, England.

The declaration stated that the plaintiffs, on June 2, 1851,

1853. June 14. — Crozier vs. Browne.

at Liverpool chartered the British ship *Charles Molloy* to freight for a certain voyage in a charterparty made between them and George Liddle, the master, and as such the agent of the owner with lawful authority to enter into such charterparty, by which it was stipulated that the said ship should proceed to sea within twenty-four hours after completion of her loading, provided any other square-rigged vessel should proceed to sea, and that notice in writing should be served upon the said master by the plaintiffs, requiring him to proceed to sea, and in default the owner should pay to the plaintiffs as charterers the sum of £10 for each day the vessel should remain in port after the time she should have proceeded to sea.

That it was the master's duty under the said charterparty to receive and take on board from plaintiffs, within a reasonable time, a full cargo of lawful merchandise, but that the said master would not do so, although the plaintiffs tendered the same.

That, but for the default and refusal of the master, the loading of the ship could have been completed so that she might have proceeded to sea on July 26, 1851, as by written notice from the plaintiffs she was required to do, but that, owing to such default and refusal, the loading was not concluded until July 30, 1851.

That, but for the delay, the vessel could have proceeded to sea on July 26, and by the delay the plaintiffs sustained the same damage as if the ship had neglected and refused to proceed to sea in accordance with the charterparty—namely £10 for every day of the four days' delay.

That, although the loading was completed on July 30, and other square-rigged vessels proceeded to sea every day up till August 16, and although notices in writing were served on the master requiring him to proceed to sea, yet he could not do so till August 16, whereby the defendants became liable to the plaintiffs for £160, being for delay of 16 days at rate of £10 per day.

That the owner is further indebted to the plaintiffs for £574 12*s.* 3*d.* for money lent and paid, on an account stated between them.

That the owner is further indebted to plaintiff in £29 for money expended on costs of notarial acts and declarations of witnesses which were by law necessary to be made in

England, to enable legal process to be had recourse to here against the vessel and owner.

That an account was annexed to the declaration shewing the balance due by the owner to be £366 16*s.* 11*d.*

That on June 2, 1851, Thomas Browne was, according to the certificate of registry, dated December 8, 1845, of the said ship, the sole owner, and that whilst so the plaintiffs took proceedings in this Court, and by an order dated December 11, 1852, the ship was arrested for the purpose of founding jurisdiction.

That on January 2, 1852, edictal process was taken out against Thomas Browne, commanding him to appear on April 13, 1852, to shew cause why he has not paid the sum aforesaid, and that the citation was served personally upon him on April 8 at Bucklersbury, London.

That on April 13, whilst the plaintiffs were ignorant of the fact that the first citation had been personally served, they requested the first default and the profit thereof, and a second summons was granted upon the non-appearance of T. Browne, requiring him to appear on August 2, 1852.

That on May 29, 1852, the plaintiffs filed their declaration.

That on July 9, 1852, the plaintiffs made due and sufficient service on T. Browne of the second summons and the declaration, and a notice informing him that the declaration had been filed, and that he must appear to purge his default before August 26, 1852, or be barred, in which case the said cause would be set down for August 31, 1852.

That afterwards, while the plaintiffs were ignorant of the service on August 2, they obtained the second default and a third summons, calling upon T. Browne to appear on November 30, 1852.

That having received from England proof of the service of the declaration and notice, they set the cause down for trial on August 31, 1852, on which day T. Browne, though duly called, did not appear.

That on August 31, 1852, George Liddle, the master, as the attorney of Elizabeth Browne, acting under a power of attorney dated October 9, 1851, alleged that the said E. Browne was and had been at all times sole owner of the ship, and moved the Court to set aside the arrest and all

1853.
June 14.
—
Crozier vs.
Browne.

the proceedings with reference thereto, which motion the Court refused.

That being advised that the said E. Browne, if indeed such sole owner, would be liable for the sum of £360, and fearing that by some fraud or contrivance between George Liddle and defendants they might be prejudiced in executing any judgment against T. Browne as supposed owner, in case E. Browne was not brought into Court, they moved the Court on October 12, 1852, for leave to amend the summons by adding the name of E. Browne, summoning her to appear on November 30, 1851, to intervene, and to pay to the plaintiffs the sum demanded, and that service of the summons upon George Liddle as such attorney might be deemed good service, which was granted by the Court at the risk of said plaintiffs, subject to all just exceptions.

That the summons was amended and served upon George Liddle on October 29, 1852.

That on November 30, 1852, the plaintiffs obtained the third default.

That on February 1, 1853, the plaintiffs obtained leave to issue a fourth citation, amended as aforesaid, calling upon T. Browne to purge his third default, and to see an *intendit* exhibited with verification thereof, and calling on E. Browne to appear and plead to said *intendit*, and by the order of the Court T. Browne was required to appear on June 1, and E. Browne on March 30.

That E. Browne claims to be sole owner of the said ship under a bill of sale dated August 21, 1848, recorded under provisions of Act 8 & 9 Vict. c. 89, on October 24, 1848, but that, instead of causing the ship to be registered *de novo* upon such change of ownership, she has suffered the said ship to trade from thence until the arrest in Algoa Bay, under the certificate of registry dated December 8, 1845, by which T. Browne was stated to be sole owner, notwithstanding that the said ship has since the date of execution of the bill of sale more than once visited Newcastle, her port of registry, and has been otherwise in such places that the said E. Browne might and should, if there were no fraud and collusion between the said defendants, have registered the ship *de novo*.

That the said E. Browne not only permitted the said ship to continue to trade under a certificate of registry by which

T. Browne appeared to be sole owner, but that George Liddle, master of the ship before and at time of the supposed bill of sale, and who now sets up the title of E. Browne, has in this colony since the arrival of the ship upon her present voyage, represented the ship to be the property of T. Browne, never having, until August 31, 1852, sought to intervene for E. Browne in the action then pending against T. Browne, although personally served on January 12, 1852, with a copy of the first citation.

That the said E. Browne, if indeed such owner, is as such liable to the plaintiffs for their demand, and that they have been misled into the course of treating T. Browne as owner by her fraud, collusion or neglect, and that of George Liddle her attorney. Wherefore the plaintiffs prayed that T. Browne may be declared owner of the ship, and be condemned to pay the sum of £366 16*s.* 11*d.*, or that E. Browne may be declared to be the owner, and condemned to pay the said sum, and that whichever of the said defendants may be condemned to pay this sum may also be condemned to pay the costs of suit.

The account referred to was annexed, and was between "Captain George Liddle and owner of brig *Charles Molloy*" and Crozier Bros. of Liverpool and Cape Town, and showed a balance of £366 16*s.* 11*d.*, "carried to debt of ship and captain." The defendants were in default. The plaintiffs put in the charterparty executed by Liddle as master on behalf of the owners, dated June 2, 1851; also accounts of disbursements and advances made by plaintiffs for provisions, &c., for the *Charles Molloy* at Liverpool and the Cape, certified by Liddle as correct; also the four citations; also the declaration and notice of trial and documentary proof of service thereof, upon T. Browne, and upon Liddle as agent of E. Browne. The Orders of Court were also put in, and evidence proving the demurrage, and the plaintiffs further called

George Liddle, who proved the correctness of the account of the advances made by plaintiffs amounting to £574 12*s.* 3*d.* Witness also produced the ship's certificate of registry under which he sailed, dated December 8, 1845, by which T. Browne was stated to be sole owner. He admitted that the ship had since August, 1848, visited Newcastle, that he went to Newcastle in August, 1848, by order of T. Browne,

1853. June 14. — Crozier vs. Browne.

the owner, and proved the signature of T. Browne to a letter to his son, dated London, containing the words: "I intend to sell the *Charles Molloy* at the Cape of Good Hope if I can get any price for her."

Porter, A.G. (with him *Brand, J. H.*), was heard for plaintiff.

THE COURT gave judgment for the plaintiff for £297 16*s.* 11*d.* with interest from December 11, 1851, and costs against T. Browne, being the amount of the balance of account before given, less the item of costs and certain demurrage not proved; and stated that they could consider no one but T. Browne as the owner, and could pay no attention to the endorsement on the register at the Custom House at Newcastle, by which the sale to E. Browne appeared, nor could they give effect to an alleged mortgage by E. Browne now set up by Liddle stating that there appeared to have been collusion throughout.

[Plaintiff's Attorney, J. BARKER.]

HEINAMAN *vs.* JENKINS.—RE "PEYTONA."
(*In* Camerâ, Coram *Bell, J.*)

Arrest.—Rule of Court 8.—*Affidavit.—Jurisdiction.*

It is not competent to issue process of arrest under Rule 8 *by swearing an affidavit and delivering it to the Registrar, and there is no authority for such practice in the Rule; whether a warrant of arrest ought to be granted or not, must be judicially decided.*

The Court has no jurisdiction as to a contract entered into at New York between the master and a passenger of an American ship in Table Bay in the course of her voyage; such contract relating to the carriage of goods in the ship, and to be performed at Melbourne, and the parties not being domiciled in the colony (per BELL, J.).

The defendant was master of the American bark *Peytona* from New York to Melbourne with emigrants, which had put

into Table Bay for water. He was arrested in Cape Town by the plaintiff, a Frenchman, one of his passengers, who had embarked at New York, and had cargo on board, which he claimed should be delivered to him here, he offering to pay the freight to Melbourne, cost of landing, expenses of detention, &c.

The affidavit on which process of arrest had been issued was by the plaintiff and two other passengers, to the effect that they sailed from New York on February 9, that the vessel was ill-found in water and provisions, and had to put in to Bahia, that there was barely sufficient food to last to this port on one fourth the usual allowance, that the master was constantly intoxicated and had tried to wreck the vessel for the sake of the insurance, that it was also attempted to to set the vessel on fire, and that the deponents believed that the vessel could not reach its destination through the neglect and incapacity, if not from the wilful intention, of the master. Further, that plaintiff had on board goods to the value of £1500, that he had demanded of the master to land them here, he paying all costs, but that the master had refused, that plaintiff believed the goods would be wholly lost if the defendant was allowed to take them away, and that the ship was about to clear for Melbourne.

On this affidavit sworn before the Registrar of the Supreme Court as Commissioner thereof, process of arrest was sued out and defendant was arrested on the 27th, and no security having been given, he was detained in prison till the 30th. On this day it was sought to set aside the arrest: an affidavit was produced signed by upwards of twenty passengers, denying most of the allegations on which the arrest was founded, and speaking highly of the captain's conduct, that there was a good supply of water put on board at New York, that there was no insubordination (as had been alleged) on board the ship, and the defendant had not been intoxicated since leaving Bahia, and that they had confidence in the defendant and the arrangements on board, that several of deponents had cargo on board which would be greatly injured by further detention, and that the delay and inconvenience in getting out plaintiff's cargo would be great.

Watermeyer moved to set aside the arrest on the grounds, first, that this was a question between the master of an

1853.
June 30.

Heinaman *vs.* Jenkins. *Re* "Peytona."

American ship and a party who had shipped goods at New York to be conveyed, according to the Bill of Lading, to Melbourne, and there delivered, and the Court of the Colony had no jurisdiction. Even if this were an English ship from a port in England the Court here could have no jurisdiction in respect of a contract entered into in England and to be fulfilled at Melbourne. The captain had the legal custody of the goods, and was bound to deliver them in Melbourne. Secondly, this was not a case in which process could be sued out under Rule of Court 8. Here there was no money due or damages actually sustained by non-fulfilment of a contract and no illegal detention, for by the very terms of the contract the captain was bound to detain the goods.

[BELL, J., requested the defendant's counsel to apply himself to the mode in which the arrest had been sued out.]

Porter, A.G.—The affidavit was sworn before Mr. Bowles, Commissioner, as required by Rule 8, the practice according to the rule being that an affidavit shewing cause of action and having the other necessary ingredients having been sworn before a Judge or Commissioner of the Supreme Court, and delivered to the Registrar, process followed as a matter of course. This had been the practice for twenty-five years, ever since the rule had been in force.

BELL, J., stated that he could find no authority for such practice in the words of the rule, and he was not bound by any practice for whatever length of time it may have lasted for which there was no authority. In this case the practice was one of a very serious nature. A man's liberty could not be taken from him by the mere ministerial act of an officer of the Court. Whether a warrant of arrest should be granted or not, ought to be judicially decided on grounds properly brought before a Judge or the Court. After judicial hearing alone could it be competently determined whether a man as a defendant in a civil matter was to be deprived of his liberty or not. On the ground that the process had not been properly sued out he would discharge the arrest without entering upon the merits; that he had much considered the subject, and wished it to be known that no power of arrest existed by merely swearing an affidavit, and then going to the Registrar. In consequence of the practice having continued so long he would discharge the arrest without costs.

Porter, A.G., pressed the learned Judge to defer a definite decision on the point until the question could be brought before the full Court, as this view was opposed to that which had been taken by the other Judges during the whole time of the existence of the Supreme Court.

BELL, J. said he had arrived at this decision after careful consideration, and could not for an instant prolong the imprisonment of a man whom he considered illegally in custody; but that he was ready to enter into the question whether there should be process of arrest in this case, if it were desired.

The case was then argued upon the facts disclosed in the affidavits.

BELL, J. said that he could not grant the arrest as he had no authority to do so. The Court had no jurisdiction with regard to this contract entered into at New York, and to be fulfilled at Melbourne. Irrespective of this, the rule according to which arrests may be granted, required with reference to detention of goods that there should be an affidavit of illegal detention; and the affidavit in this case did not, and indeed could not, allege this.

The arrest was therefore discharged.

LE ROES *vs.* LE ROES.

Restitution of conjugal rights.—Malicious desertion. Onus of proof.

In action for restitution of conjugal rights, where defendant admits having left her husband, but pleads justification, on account of ill-treatment, the onus of proof is upon defendant, who must first lead evidence.

This was an action for restitution of conjugal rights brought by J. C. C N. Le Roes against his wife A. D. Le Roes.

The declaration set forth that the parties were married on May 11, 1834, in Cape Town, and that on February 15, 1853, the defendant unlawfully and maliciously deserted the

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plaintiff, and has continued to live apart and refuses to return. The defendant pleaded that the plaintiff ought not to have his action, since for several years and especially between May 23, 1852, and February 14, 1853, the plaintiff, who was in the habit of becoming intoxicated, grossly ill-treated her, beating her and threatening to choke and stab her; and that by reason of such ill-treatment, and through a well-grounded apprehension of danger to life, she left defendant and has continued to live apart from him.

Porter, A.G., for the plaintiff contended that in this case the onus of proof was upon defendant.

Watermeyer for defendant agreed, and proceeded to call evidence of misconduct, intoxication, and ill-usage on the part of the plaintiff.

After defendant's witnesses, who deposed to ill-usage, had been called, the plaintiff's counsel called rebutting evidence. The evidence was of a very conflicting nature.

THE COURT (by a majority, BELL, J., diss.) decreed absolution from the instance, on the ground that a plaintiff in a case of this sort must come into Court with clean hands.

MUSGRAVE, J., in the course of his judgment said: It will be remembered that I have often expressed myself very strongly against the facility which is given to married persons in this country to obtain a divorce for malicious desertion. As far as the present law obliges us to decree a divorce for malicious desertion we must of course be content to act upon it, but when we have two positive oaths to the plaintiff's improper conduct, and only negative evidence on the other side, we ought not, I conceive, to order the defendant to return to her husband and thereby either expose her to further personal violence from him, or in case of her refusal enable him to effect his purpose of discarding her and forming another connexion. I sincerely trust that this subject will be taken up by the new Parliament, and the law of divorce placed on a more satisfactory footing.

[Plaintiff's Attorney, C. J. BUISSINNÉ.
Defendant's Attorney, G. J. DE KORTÉ.]

FIELDEN *vs.* ANSTIE AND BUCHANAN.

Ords. 14, 1845.—32, 1846.—*Jurisdiction.—Ordinance not confirmed.—Governor's Instructions and Commission. —As to whether an Ordinance can be confirmed by implication.*

The Royal Instructions to the Governor provided that any Ordinance if not confirmed by Her Majesty within three years after its passing, should cease to have any force or effect; and in the Governor's Commission it was provided that a transcript of every Ordinance which has acquired the force of law should be transmitted to the Secretary of State and to the Chief Justice of the Colony. By Ord. 14, 1845, *passed on Oct.* 16*th*, 1845, *appeals were allowed from the District Court of Natal to the Supreme Court: this Ordinance was duly passed by the Governor with the advice and consent of the Legislative Council, as provided in the terms of the Governor's Commission, which contained the proviso "subject nevertheless to all such rules and regulations as by your Instructions we have thought fit to prescribe." In* 1846, *acting upon a despatch of the Secretary of State, an Ordinance was passed, and duly confirmed in* 1847, *which amended Ord.* 14, 1845, *as to a certain section. Ord.* 14, 1845, *was never expressly confirmed or disallowed, nor was a transcript transmitted as prescribed.*

Held, *that Ord.* 14, 1845, *had ceased to have any force or effect, and that the Court had no jurisdiction to entertain appeals from the Natal Court.* [MUSGRAVE, J. *diss.*]

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This was an argument upon the question whether the Supreme Court's appellate jurisdiction over the District Court of Natal, granted under Ord. 14, 1845, had ceased in respect of that Ordinance not having been confirmed within three years from the passing thereof.

THE COURT did not enter upon the merits of the case, but the Judges proceeded to express their opinions upon the general question of the Court still having the power of entertaining appeals from the Natal District Court.

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Porter, A.G., for appellant, referred to 2 *Dwarris* on Statutes, p. 999.

Watermeyer, for respondents, did not object to the jurisdiction of the Court, if such was competent, and argued that Ord. 14, 1845, was in force till actual repeal, and that the Court had therefore jurisdiction.

Porter in reply.

Cur. adv. vult.

Postea (*Aug.* 16),—

THE COURT (by a majority, MUSGRAVE, J., diss.) decided that it had no longer any appellate jurisdiction.

WYLDE, C.J., said:—The decision of the Court involves two points of serious import; one, whether the suitors in the District Court of Natal are in point of law deprived of their original appellate jurisdiction to this Court under the Ordinance erecting and establishing that Court in 1845, and the other, whether the Supreme Court can continue to exercise any appellate jurisdiction at all over the decisions of the District Court. As to both these objects it behoves the Judges to exercise the most watchful, jealous and cautious discretion. No one could justly doubt that the Judges would be anxious to continue the salutary jurisdiction awarded to residents in the district in respect of appeals from the Local Court, but perhaps it was still more incumbent on the Court not to attempt the exercise of a jurisdiction if such in legal principle was no longer to be found in them. It might be well to state that this deficiency of jurisdiction, if existing, arises from the fact of Her Majesty not having been pleased or not having seen cause to confirm the Ordinance erecting the Local Court of Natal within the period of three years from the date thereof; whereby in pursuance of Her Majesty's Royal Instructions, it "ceased to have any force or effect within the Colony." It could not be denied that the Court had, since the expiration of such legal period, proceeded in two or three cases to exercise appellate jurisdiction, but such judgments, of course, had been given because such expiration of the Ordinance had not been adverted to at all, and so brought to the observa-

tion of the Judges for any determination as to such objection if taken before the Court. The Judges, certainly, were impressed that no failure had taken place as to the proper steps to be adopted by the Government authorities as to acquiring a knowledge of Her Majesty's pleasure for the allowance or disallowance of that particular local Ordinance. The Court, however, upon ascertaining the difficulty in question, had referred itself to the local Government for information, and made fully known, in February last, the state of the law with regard to the Natal appellate jurisdiction. It became necessary, therefore, to inquire as to the main question of jurisdiction, what was the law under which it was raised. At the time of passing Ord. 14, 1845, viz., October 16, 1845, the District of Natal was *a part of the Colony* of the Cape of Good Hope, and as such became subject to such laws as should be passed by the Governor and Council; and, by the provisions of that Ordinance, it was enacted that it should and might be lawful for the parties to any civil suit to appeal to this Supreme Court against any final judgment, decree, or sentence of the District Court. But no laws that could be passed by the Governor in Council would, under Her Majesty's Royal Instructions, remain in force and effect, unless within the term of three years the same had been allowed by Her Majesty. In this allowance or disallowance, therefore, of every Ordinance, was involved the highest *prerogative of Her Majesty*, as entirely controlling and limiting the legislative authority to be exercised over Her Majesty's subjects within the settlement. Like all other questions, therefore, of royal prerogative, the Courts were bound to exercise due caution that the same remain full, certain and undisturbed, as far as their judgments could affect such high faculty of Her Majesty and Government. Under the Governor's Commission it is prescribed and granted that the Governor, with the advice and consent of the Legislative Council, shall make and enact, ordain or establish laws for the order, peace, and good government of the settlement, "subject, nevertheless, to all such rules and regulations as by your said Instructions we have thought fit to prescribe in their behalf," and also, "provided nevertheless, and we do hereby reserve to ourselves the undoubted right and authority to disallow any such laws, and to make and establish, from time to time, all

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such laws as may appear to us necessary." Thus the power and authority to make any laws must be taken in connexion with, and are to be regulated by, the *Instructions* of Her Majesty in that behalf. Referring, then, to the Instructions in that behalf, it is therein provided: "We do hereby reserve to ourselves full power and authority to confirm and finally enact, or to disallow, any Ordinance which may be passed by you, with the advice and consent of the said Legislative Council, *either in whole or in part*, such confirmation or disallowance being from time to time signified to you through one of our Principal Secretaries of State. And if on any occasion our pleasure should not be signified to you, upon any such Ordinance as aforesaid, within three years next after the date thereof, then, and in every such case, it is our pleasure, that from and after the expiration of such term of three years, such Ordinance *shall be deemed to be disallowed*, and shall henceforth cease to have any force or effect within our said settlement." The power and mode, therefore, of making laws are as much dependent upon the Royal Instructions as upon the Commission of the Governor's appointment, and must be read and construed in the same way—as it would seem to me—as if the Instructions had been embodied in the Commission itself; and, therefore, if a period of three years shall have expired from the date of any Ordinance whatever, passed by the Governor and Council without such Ordinance having been specifically confirmed by Her Majesty, it must be taken as ceasing to have any longer operation, and as if no such Ordinance had been passed by the Legislature. But, in order to secure to Her Majesty the solemn and due exercise of this her royal prerogative, the Royal Instructions specify *the particular mode*, in which Her Majesty's pleasure shall be signified to the Supreme Court, as to such allowance of any local Ordinance—requiring and enjoining the Governor "to transmit to the Chief Justice of the Supreme Court of Judicature to be enrolled in the said Court, a certificate under his hand and seal, of the effect of every order which he may have received from Her Majesty, for confirming or disallowing in the whole, or in part, or for amending the provisions of any such Ordinance; which certificate shall, in like manner, be enrolled in the said Court, and there remain of record, to the intent that the Judges of the said Court may, without

further or other proof, take cognisance of all Ordinances made and promulgated for the peace, order and good government of the settlement." Whatever, therefore, may be the mode or practice as to Her Majesty making known her pleasure in the allowance or disallowance of any local Ordinance, and whatever may appear sufficient to the Governor as a due signification of Her Majesty's pleasure thereon, it seems clear, that as to the Court's cognisance thereof, there is *one fixed, precise, formal mode* of making known Her Majesty's pleasure to the Judges of the Court. And it is admitted that no such communication as to Her Majesty's pleasure, with regard to the Ordinance on which the appellate jurisdiction in question is founded, has been transmitted to the Judges.

But it has been argued that although Her Majesty's pleasure has not been directly or immediately communicated, yet that it may be inferred from Her Majesty's recognised allowance of another Ordinance which refers to the jurisdiction of the District Court of Natal. It becomes necessary, therefore, to trace to some degree the particulars of these two Ordinances.

In Ord. 14, 1845, it was provided that "it shall and may be lawful for the said District Court, by any rules or orders of Court, to be from time to time for that purpose made and published, to form, constitute and establish such rules, orders and regulations, as to it shall seem meet, touching and concerning the practice and proceedings of such Court." "Provided always, that such rules shall be afterwards transmitted to the Lieutenant-Governor of the District, in order to be immediately transmitted to Her Majesty for approbation or disallowance." Under date October 30, 1846, an Ordinance was passed, the title of which is "for amending the *law regarding certain rules of Court;*" and in the preamble of that Ordinance it is stated that "whereas the District Court of Natal did, some time since, form, constitute and establish, under and by virtue of, and according to, the provisions of the hereinbefore in part recited section of Ord. 14, 1845, aforesaid, certain rules, orders, and regulations, which were afterwards transmitted as by the said section required to Her Majesty the Queen, for her approbation or disallowance: and whereas Her said Majesty has been graciously pleased *to refrain from*

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approving or disallowing the said last mentioned rules, orders and regulations, and has instructed the Governor of this Colony to propose to the Legislative Council thereof, to amend the *law as contained in said* § 29 of the said Ord. 14, 1845, in such manner as to render the confirmation by means of an Ordinance of the said Council of every such rule, order, or regulation, as aforesaid, requisite and necessary, before the same shall take effect or have the force of law." And it was therefore enacted that § 29 of Ord. 14, 1845, should be re-enacted (and not the entire Ordinance or any other provision thereof), "and any other law or usage repugnant to or inconsistent with any of the provisions of this Ordinance shall be and the same are hereby repealed accordingly." This later Ord. 32, 1846, was duly confirmed by Her Majesty, and gazetted accordingly in August, 1847; and a certificate of such confirmation was transmitted to the Chief Justice for enrolment in August, 1849. This act, however, of confirmation on the part of Her Majesty appears to me as, in its very terms, only to apply to the *particular enactment* under which the District Court of Natal was to remain authorised, as to rules and regulations of its practice, and the expression of Her Majesty's pleasure in such act of confirmation cannot be *extended beyond the particular jurisdiction of the District Court in forming and establishing rules of practice.* I am therefore unable to perceive that, under this partial and particular confirmation of a certain particular enactment of Ord. 14, 1845, it can be justly contended that Her Majesty can be taken to have given such an expression of her pleasure as to be taken and considered to have expressed a confirmation of the entire Ordinance; and consequently every enactment and provision of that Ordinance, except the particular § 29, would cease to have any force or effect within the district, unless Her Majesty were to confirm the same within the term of three years from its date; and as so high a question of prerogative is involved, it is not competent to the Court to presume upon any such Royal approbation as is necessary beyond that period, to keep the enactments of that Ordinance, in due form and effect, except on the absolute and formal signification of such Her Majesty's pleasure thereon.

On reference to Ord. 14, 1845, many special enactments are to be found, under which jurisdiction is given to the

Supreme Court over cases brought before the District Court; as, for instance, in criminal cases where a verdict of guilty has been found, it was made lawful for the District Court "to order and direct that such cases be removed to the Supreme Court for the decision or determination of any point or questions of law arising upon such case; and that the Supreme Court should adjudge, decide, and determine the said points or questions, and then shall remit the case with its judgment, decision, or determination, to the said District Court, which Court shall confirm and give effect to the same;" and under other clauses, appeal, and the proceedings thereunder, at and before the Supreme Court, are provided for in enactments. The Supreme Court cannot therefore venture to exercise any such high and responsible jurisdiction under the uncertainty that no due signification of Her Majesty's pleasure has ever been made, by and under which alone such enactments can continue to have any force or effect, or any jurisdiction thereunder be legally exercised. It might be supposed that, under circumstances connected with the public interest in the District of Natal, Her Majesty could have no fixed purpose of denying to her subjects there the continued advantage of the local Courts' jurisdiction as to appeal, and that inasmuch as she has confirmed the power, under modification, of the Court to make its rules of practice, she could have no intent of cutting off the salutary relief of the appeal previously granted to them. But in principle, such a view cannot be justly entertained, I conceive, as to the exercise of the royal prerogative. The principle, in its construction, must be directly and universally applied to all Ordinances made and established by the local Legislature, as having only force and effect for a period of three years, unless then, or previously, Her Majesty's pleasure as to approbation or disallowance had been signified. As to the appellate jurisdiction, therefore, from the District Court to the Supreme Court, there was no such jurisdiction in force or effect; and it must be taken to have been Her Majesty's pleasure that Ord. 14, 1845, should not continue in force, except as continued in force by the provisions of Ord. 32, 1846—that is to say, as far as the Legislature of this Colony is concerned.

As to the actual omission of any act of confirmation, by Her Majesty, of Ord. 14, 1845, all doubt is removed by an

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Ordinance passed in the District of Natal, since it obtained its separate Legislature, and became severed from this Colony in a separate and distinct administration, dated Dec. 7, 1850, and entitled an Act "for re-enacting an Ord. 14, 1845, and for giving validity to all Acts which have been done *in the presumption* of the continuance of the same." The preamble states that "whereas it is provided in Her Majesty's Royal Instructions, to the Governor of the Settlement of the Cape of Good Hope, that if on any occasion our pleasure should not be signified unto you upon any Ordinance, as aforesaid, within three years after the date thereof, and in every such case, it is our pleasure that from and after the expiration of such term of three years, such Ordinance shall be deemed to be disallowed, and shall henceforth cease to have any force or effect within our said Settlement; and whereas the said Ord. 14, 1845, ceased to have any force or effect, in manner aforesaid, upon October 16, 1848; and whereas Her Majesty has been pleased to direct, through Her Majesty's Principal Secretary of State for the Colonies, that an Ordinance re-enacting the said Ordinance and for giving validity to all Acts, which have been done in the presumption of its continuance, shall be submitted to the local Legislature; be it therefore enacted, that from and after the promulgation of this Ordinance the said Ord. 14, 1845, shall be and is hereby repealed." But as the Legislature of the district could not make and establish laws having any force or effect except within the District itself, it surely follows that no power could thereby be renewed or again given to the Supreme Court of this Colony, as to the exercise of any appellate or other jurisdiction, to be exercised, under the provisions of the original Ordinance of this Colony, for the erection of such District Court at Natal.

The utmost effect, therefore, of the Natal Ordinance was to erect anew the District Court, and its jurisdiction, as far as —and only as far as—it could be given effect to within the district. It was not competent to the Natal Legislature to grant or convey any appellate jurisdiction to the Supreme Court as duly established within another Colony,—that of the Cape of Good Hope. The Ordinance, therefore, could have no legal contact with the Supreme Court nor vest any power in the Court to exercise any jurisdiction in and over causes arising within or adjudged by the District Court of Natal.

The Supreme Court of this Colony held such jurisdiction heretofore only under the Ordinance of the Cape Legislature, which Ordinance that of the Natal Legislature states in its preamble to have "ceased to have any force or effect," as it had not pleased Her Majesty to confirm it within three years from its date.

The Secretary of State's direction with regard to the confirmation of every rule of Court, either of the Supreme or District Court, has been misconceived and misconstrued; the direction extends only to rules *of a legislative nature*, and not to the ordinary general rules connected with the process and proceedings of the Court. However, as the law at present stands, it is certain that the Court cannot make the most ordinary rules of practice of any effect without the support of a legislative enactment.

At the time Ord. 32, 1846, was passed, Ord. 14, 1845, was still in force and effect for a further time of thirteen months, although Her Majesty had not, as then, expressed her pleasure thereon; and therefore the latter Ordinance had its operation over the proceedings of the District Court. It is also to be remarked that the same Secretary of State was not in possession of the Colonial Seals at the time the latter Ordinance was referred to Her Majesty; and in the absence therefore of any approbation being signified by Her Majesty it is matter of presumption that Her Majesty saw cause for not allowing the Ordinance to remain in force and effect beyond the period of three years. It certainly becomes matter of regret that Her Majesty saw cause for refraining from either allowing or disallowing the said Ordinance; but bound as the Judges are, in all duty and principle to act upon, and only up to, the jurisdiction vested in their exercise, it seems to me that the Supreme Court has no longer any appellate jurisdiction, the exercise of which is applied for in this case, as to the appeal in question; and consequently that the application to proceed upon such appeal cannot be legally entertained, however anxious the Judges are to assist, as far as they are legally able, the due administration of civil justice within the District of Natal.

MUSGRAVE, J., said: This case comes before this Court on an appeal from an order of the District Court of Natal, and the preliminary question which we have now to determine

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is, whether that appeal can be legally entertained. It is alleged that the Ordinance for erecting the District Court of Natal is not at present in force; and if this allegation should prove to be well founded, as our appellate jurisdiction is derived exclusively from § 30 of the Ordinance, the proceedings in appeal would of course be *coram non judice*. It is clear that Ord. 14, 1845, was passed by the then Governor, with the advice and consent of the Legislative Council in due form of law, *and was directed to take effect immediately after the promulgation of it in the Government Gazette*, and it is equally clear that it has not been either *expressly* repealed or *expressly* disallowed. But it is contended that, under one of the articles of the Royal Instructions to which I shall presently refer, it must be considered as having ceased to have any effect at the expiration of three years after the date of it, in consequence of its not having been expressly confirmed by Her Majesty within that period. This question, when viewed in all its bearings, is obviously one of very great importance, but it appears to me to be altogether free of difficulty for the reasons which I am about to assign.

We learn from an official correspondence which has been produced by Her Majesty's Attorney-General, from the Colonial Office, that when Ord. 14, 1845, was passed, a transcript of it was transmitted to the then Secretary of State, who, in reply to the despatch which accompanied it, objected to the power which was given to the Recorder by § 29 *to establish rules of Court*, and instructed the Governor to propose to the Legislative Council *an amendment of that section*—that Ord. 32, 1846, was, in consequence, enacted by which the section so objected to was repealed—and that the operation of this latter Ordinance was suspended until after the notification of Her Majesty's approval and confirmation of it was afterwards regularly notified in the usual manner in the Cape of Good Hope *Government Gazette*—that a transcript of it was then transmitted to the Secretary of State, and Her Majesty's approval and confirmation of it was afterwards regularly notified in the usual manner in the *Government Gazette* of this Colony, *within three years after the date of Ord.* 14, 1845—that a transcript of the original Ord. 14, 1845, was transmitted at the same time with that of Ord. 32, 1846, which amended it, and that no notice was taken of the former by the Secretary of State in the despatch

which signified Her Majesty's confirmation of the latter. The words of Art. 30 of the Royal Instructions, upon which the present question arises, are "and we do further direct that when any Ordinance shall have been passed by you, with the advice and consent of the said Legislative Council, the same shall forthwith be laid before you for our final assent or disallowance or *other direction thereupon*, to be signified through you, for which purpose we do hereby require you with all convenient speed to transmit to us through one of our Principal Secretaries of State, a transcript in duplicate of any such Ordinance as aforesaid, duly authenticated under the public seal of the said settlement and by your own signature; and we do direct that every such transcript be so transmitted *by the earliest occasion* next after the enactment of the said Ordinance, and that any Ordinance which shall be passed by you, with the advice and consent of the said Legislative Council, shall take effect and come into *operation as law* from and after the date of the *promulgation thereof* or from and after the time it shall be enacted by you, with the advice and consent of the said Council, that such Ordinance is to take effect and come into *operation as law*. And we do hereby reserve to us, our heirs and successors, full power and authority to confirm and finally enact, or to disallow any Ordinance which may be passed by you with the advice and consent of the said Legislative Council, *either in whole or in part*, such confirmation or disallowance being from time to time signified to you through one of our Principal Secretaries of State. And we do further reserve to ourselves, our heirs and successors, with the advice of our Privy Council, full power and authority to amend any such Ordinance as aforesaid, in such manner as may be necessary or expedient; and if on any occasion our *pleasure* should not be signified to you upon *any such Ordinance* as aforesaid, within three years next after the date thereof, then and in every such case it is our pleasure that, from and after the expiration of such term of three years, such Ordinance shall be deemed to be *disallowed*, and shall thenceforth cease to have any force or effect within our said settlement." I am of opinion that the first despatch from the Secretary of State sufficiently conveyed Her Majesty's *pleasure* upon Ord. 14, 1845, which was that it should be *amended* in one of its provisions, from which it must be reasonably inferred that it was not considered

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objectionable in any other respect, and would, if so amended, be approved by Her Majesty, and that Her Majesty having subsequently confirmed the Ordinance which so amended it, such confirmation must, by necessary *legal implication*, be held to have involved a virtual assent to the *other parts* of the original Ordinance, agreeably to the principle *Expressio unius est exclusio alterius*, and that such virtual assent is, moreover, implied by the words of the preamble of Ord. 32, 1846, which has been so confirmed by Her Majesty, by the words in the first rule in the schedule to that Ordinance, and by the title and preamble, and enacting clauses of Ord. 11, 1847, "For amending Ord. 14, 1845, intituled Ordinance for erecting a District Court in and for the District of Natal;" and by these several subsequent Ordinances, Ord. 14, 1845, stands directly recognised and adopted as an *existing law*. Her Majesty's pleasure is not required to be signified in any particular manner, and as a contract may be either *express or implied*, and an Act of Parliament may be *constructively repealed by implication*, so Her Majesty's assent to an Ordinance may, I conceive, be either *expressly or impliedly given*, and I am unable to bring my mind to the preposterous conclusion that an Ordinance which Her Majesty *directed to be amended*, and which *was amended* according to her directions by an Ordinance which she has *expressly confirmed* must be "deemed to be disallowed." In the course of the conference which was held by the Judges after the rising of the Court on Thursday last, the Chief Justice threw out an impression that, as no certificate of confirmation of the original Ord. 14, 1845, had been transmitted to him for enrolment, the Court could not legally take cognisance of it as an existing law. In stating the grounds of my dissent from him upon this additional objection to the validity of that Ordinance, it will be necessary that I should take a comprehensive view of the Royal Commission and Instructions and offer my own impressions upon the legal construction of the respective clauses and articles in the order in which they occur. The terms of Her Majesty's Commissions to her respective Governors of this Colony, and the general Instructions which have been given with them, have not differed very essentially from each other since the establishment of a Legislative Council in it. Ord. 14, 1845, was passed during the administration of Sir Peregrine Maitland. I have not a copy of

the Commission and Instructions under which he acted, but I believe them to be similar to the Commission and Instructions to Sir Harry Smith, to which I am about to refer. The words of the Commission, as far as it relates to *Legislation*, are these: "And we do hereby give and grant unto you, the said Sir H. G. W. Smith, full power and authority, with the advice and consent of the said Legislative Council, to make, enact, and establish laws for the order, peace, and good government of our said settlement of the Cape of Good Hope and its dependencies, but *subject*, nevertheless, to all such *rules and regulations* as by our said Instructions we have thought fit to prescribe. Provided, nevertheless, and we do hereby reserve to ourselves, our heirs and successors, our and their undoubted right and authority to disallow any such laws, and to make and establish, from time to time, with the advice and consent of Parliament, or with the advice of our Privy Council, all such laws as may to us or them appear necessary for the order, peace, and good government of the said Settlement and its Dependencies, as fully as if these presents had not been made." The general Instructions which are given with the Royal Commission, would seem to be, to a certain extent, directory, and not absolutely imperative, being intended to regulate the conduct of the Governor in the administration of his government, and not to preclude him from the exercise of a *sound and reasonable discretion* upon his official responsibility to the Government on particular occasions. In the *first* part of the Commission he is required and commanded to "do and execute all things in due manner which shall belong to his said command, and the trust which Her Majesty has reposed in him, according to the several powers and directions granted or appointed by the Commission and Instructions therewith given him, or according to such further powers, instructions, and authorities, as should at any time thereafter be granted or appointed for him under Her Majesty's Sign Manual and Signet, or by her Order in Privy Council, or by her through one of her Principal Secretaries of State,—whereas, in the *subsequent part* of the Commission, which relates *to Legislation*, the powers which are given him are expressly declared to be subject to all such rules and regulations as by Her Majesty's Instructions she has thought fit to prescribe in that behalf, or as by any

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further Instructions under Her Signet and Sign Manual, or by her Order in her Privy Council, or by her through one of her Principal Secretaries of State she should or might think fit to prescribe." Arts. 4–12 relate to the Constitution of the Legislative Council, and its meetings, debates, and mode of procedure, and standing rules and orders for maintaining order and method in the dispatch of business, and in the conduct of debates. Art. 13, which has an immediate bearing upon the present question, is as follows: "And whereas we have by by our said Commission appointing you our Governor and Commander-in-chief as aforesaid, given and granted to you full power and authority, with the advice and consent of the said Legislative Council of our said Settlement, *to make, enact, ordain and establish laws,* for the order, peace and good government of our said Settlement, subject, nevertheless to all such rules and regulations as by our general Instructions we should think fit to prescribe in that behalf; now we do hereby declare the following, to be the several rules and regulations referred to in our said Commission." Arts. 14, 15, 16, are inserted for the purpose of guarding against the introduction of objectionable enactments. Art. 17 is as follows: "And it is our further will and pleasure that you do not propose or assent to any Ordinance whatever, respecting the constitution, proceedings, numbers, or mode of appointing or electing any of the members of the said Legislative Council, or otherwise in relation to any of the matters mentioned or referred to in our said Commission, and in these our Instructions, which shall be in any wise repugnant to, or inconsistent with such Commission, or to these our Instructions, or repugnant to any Act of Parliament, or to any Order made or to be made by us in our Privy Council, extending to or in force within our said Settlement; but that any such Ordinance or *pretended Ordinance* shall be absolutely null and void to all intents and purposes." This article is followed by a series of *prohibitions* as to passing or assenting to enactments of a particular description, and the latter part of it is obviously intended to frustrate any attempt which might be made to give the sanction of law to any transgression of the limits which Her Majesty has assigned to the power of local legislation, or to any act of wilful disobedience to Her Majesty's express commands or prohibitions, in reference to the exercise of that power.

It consequently appears to me that the mere non-observance of the *letter* of the Instructions respecting the transmission of a transcript of the Ordinance, which is unobjectionable in its principle, to the Secretary of State and the Chief Justice, after it has acquired the force of a law, or the transmission of a certificate of the confirmation of it to the Chief Justice, cannot be properly held to affect its validity. It is expressly declared by the Instructions, that the non-enrolment shall not affect the validity of the Ordinance, and by parity of reason the omission to transmit the certificate of confirmation ought not to do so. Ord. 14, 1845, was duly passed and put in force under the Royal Instructions—it does not belong to that class of enactments which involve a contempt of the Royal injunctions against which Art. 17 is manifestly directed, and which are designated by the appellation of pretended Ordinances—it is not made in relation to any matter which is prohibited as a subject of legislation—it has not been expressly disallowed, but, on the contrary, has received the tacit assent of Her Majesty—the Ordinance which amended it has been expressly confirmed by Her Majesty, and the confirmation of it has been duly notified in the Colony—and the Chief Justice has been furnished with a certificate of such confirmation; and under these circumstances Ord. 14, 1845, must, I conceive, be considered as being in full force and operation in this Colony. The Chief Justice has, in support of his opinion, read a copy of an Ordinance which is stated to have been passed at Natal, at the suggestion of the Secretary of Trade for the Colonial Department, for the purpose of re-enacting the provisions of Ord. 14, 1845. But it does not appear to me that this suggestion can be fairly construed into an admission on his part that such Ordinance had ceased to have effect, as he could not have very well avoided making it, when the Recorder, who was the sole Judge of the District, had expressed a doubt of the validity of the Ordinance by which his Court was constituted. It will be recollected that the Doubts Removal Ord. 17, 1844, which was passed by the Legislative Council, by the advice of my late brother Menzies, was *disallowed* by Her Majesty, and that it was nevertheless considered advisable that, as the doubts to which it related had been raised by one of the Judges of the Supreme Court, they should be set at rest by an Order

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in Council. In the case of *The Treasurer General* vs. *The Cape Town Municipality*,* which was some time since tried in this Court, I adverted to a despatch which is printed in vol. 3 of *Harding's Ordinances*, p. 558, and which appears to have been written by the then Secretary of State to the Governor, relative to the Appropriation Ordinance for 1844, the validity of which was denied by some of the members of the Legislative Council, "on the ground that the Royal Instructions to the Governor and the Standing Rules of the Council required the publication of every law for at least three weeks before the enactment of it—a proceeding which had not been observed in this case." As that despatch appears to me to bear, to some extent, upon the present question, I think it right again to refer to it in support of my opinion. One of the concluding paragraphs is in the following words: "Having made provision for the future with respect to the mode of passing local Ordinances, it is unnecessary for me to consider very strictly how far the Protests of 1842 and 1843 were well founded in point of law. If, contrary to the opinion of persons of the highest authority, who have been consulted on the subject, the Appropriation Ordinances of those years were not sufficient to justify the consequent expenditure of H. M.'s Revenue at the Cape of Good Hope for those years, the Queen would be prepared to give to this expenditure such a sanction as shall effectually supersede any such question."

The Chief Justice has expressed himself in very strong terms against Ord. 14, 1845, being held to be confirmed by *implication*, but I shall show by a reference to Mr. Dwarris' *Treatise on Statutes*, and the cases which are there adduced in support of the position, that "an Act of Parliament may be repealed either by express words or *by implication*"—and it is notorious that *in practice* a great many Colonial laws are neither expressly confirmed nor disallowed, but the signification of Her Majesty's pleasure upon them is simply that "they shall be left to their operation" (see 2 *Dwarris on Statutes*, pp. 714, 716, 673, 676).

Bell, J.:—I confess I was at first in considerable doubt as to what my judgment in this case should be. But that

* Reported 1 Searle, p. 141.

doubt, I am sensible, was occasioned chiefly by the inconvenience which would be produced to the community at Natal, if the decision of the Court should be, that it has no jurisdiction to entertain this appeal. It was unwillingness to do what should have such an effect that principally influenced my mind. But inasmuch as what I should do in this case must, in principle, regulate what I should do in any subsequent case of the same kind which might occur, I have felt myself compelled to disregard consideration of the inconvenience which I am sensible must be produced by rejecting this appeal. After patiently listening to all that has been brought forward to sustain the jurisdiction, I have not been able to avoid returning to the conclusion I had drawn at an early stage of the argument, that this Court has not jurisdiction to entertain this appeal. The Ordinance enacted by the Government of this Colony, No. 14, 1845, erects a District Court for the District of Natal, and by § 29 gives that Court power to make rules, orders and regulations for its course of procedure, and § 30 gives the litigants before the District Court a right of appeal to this Court. Its concluding section declares that the Ordinance shall have effect from the date of its promulgation in the *Gazette*. Here we have a positive and distinct announcement of legislative will, made by the legislative power which then alone existed, and if there were no more in the matter, this Court would be bound to act under it. But the Governor's Instructions, to which reference is made in his Commission, to the effect that he is to exercise his government in conformity with them, require that the Royal Sanction be given to every Ordinance passed in the Colony, with a proviso that if the Royal Sanction be not given within three years after the passing of any Ordinance, it shall "cease to have any force or effect." Previous to the date of the Constitution, which has recently been given to the Colony, the Crown had not as yet parted with any of the power which it then possessed, of legislating for the Colony in such a manner and form as it deemed proper. I take it therefore that the Instructions under which the Governor was directed by his Commission to regulate his rule of the Colony contained a law for the Colony which no Court within it could disregard so soon as they are brought to its notice. Now, these Instructions contain the Article to which I have

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referred, expressed in these words:—"And if on any occasion our pleasure should not be signified to you upon any such Ordinance as aforesaid within three years next after the date thereof, then and in every such case it is our pleasure that from and after the expiration of such term of three years, such Ordinance shall be deemed to be disallowed, and shall henceforth cease to have any force or effect within our settlement."

Then Art. 32 directs that a transcript, duly authenticated, of every Ordinance passed by the Governor with the advice and consent of the Legislative Council, shall be transmitted to the Chief Justice for the purpose of being enrolled. And the Governor is further instructed: "You are also from time to time to transmit to the said Chief Justice of the Supreme Court, to be enrolled in the said Court, a certificate, under your hand and seal, of the effect of every Order which you may have received from us, for confirming or disallowing, in the whole or in part, or for amending the provisions of any such Ordinance, which certificate shall in like manner be enrolled in the said Court, and there remain of record, to the intent that the Judges of the said Court may, without further or other proof, take cognisance of all Ordinances to be made and promulgated for the peace, order, and good government of the said Settlement." Some of these Instructions may well be merely directory, while others are imperative, according to the rules whereby statutes are interpreted. The Article which says that if the Crown do not confirm within three years, the Ordinance shall cease to have force or effect, is obviously not directory; it is peremptory, and statutory; while the Article as to a transcript of the Ordinance being transmitted for registration is purely directory. The first must be observed, and all that is done in disregard of it will be null and void, while the directory Article may be disregarded, and all that will follow is liability of the officer disregarding it to censure or punishment. Now Ord. 14, 1845, which created a District Court at Natal, gave power to this Court to review the sentences of that Court. As that Ordinance was passed and promulgated in October, 1845, it would have life and power, according to the Royal Instructions, for three years, because by its last section it was declared that it would commence and take effect from and after the promulgation thereof in the

Government Gazette, provided always that the Royal pleasure in regard to it may not sooner be signified. If that pleasure was not sooner signified it would expire in October, 1848. Presuming on the efficacy of this Ordinance, the Recorder of Natal framed certain rules and regulations in terms of the power to that effect which it gave him. These rules, &c., were transmitted to the Home Government along with the Ordinance itself. The Secretary of State acknowledged the receipt of these documents, but expressed his disapprobation of § 29 of the Ordinance, and observed that it might be amended. "When that shall have been done, I shall be prepared to recommend the Ordinance for H.M.'s approval."

Acting on the despatch of the Secretary of State, Ord. 32, 1846, was passed, to remedy the Secretary's objection to § 29 of Ord. 14, 1845. This Ordinance of 1846 was passed in the month of October, and was to take effect from and after the day when Her Majesty's approval of it should be announced in the *Government Gazette*. This Ordinance of 1846, which certainly speaks of the District Court of Natal as an existing Court, and of Ord. 14, 1845, as a subsisting Ordinance, was approved by Her Majesty, and this confirmation was promulgated in the *Government Gazette* in August, 1847, while Ord. 14, 1845, had still fourteen months to run of the three years within which the approval of it should be signified. The Home Government, while it approved of Ord. 32, 1846, correcting a clause in Ord. 14 of 1845, has never to this day given any signification of the Royal pleasure as to the latter. Now, if we are to presume in any case against the Crown, I have not a doubt that it was the Secretary of State's intention to allow the Ordinance of 1845, so soon as the correction of § 29, by the Ordinance of 1846, had been made; and I am willing to admit that an allowance of the Ordinance of 1845 may be inferred from the allowance of the Ordinance of 1846, which, *in gremio*, mentions the Ordinance of 1845. But I am not bound to presume anything *against* the Crown; on the contrary, I am bound to presume in its favour. It is said that the necessary consequence of destroying the Ordinance of 1845 is to destroy that of 1846, for 1846 cannot subsist without 1845; and that to do so is to negative the Royal Ordinance of 1846. This no doubt will be the effect. But how does this Court know that the Crown continued of the same mind as to the Ordinance of 1845, as when the Secretary of State desired

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the amendment of its 29th section? Or, that the Crown did not intend to reserve to itself *locus poenitentiae?* The then Secretary of State says, "Alter § 29, and I shall then be prepared to submit the rest of it for approval." Why did he not say, "I approve and affirm on behalf of Her Majesty all the Ordinance except § 29, and this I desire to be altered"? Why am I to infer, because the Crown was then minded to confirm the rest of the Ordinance that it continued always after to be so minded? If I were judging the case of a private individual, I should say that in these circumstances he had *locus poenitentiae* till he actually did approve. Why am I to judge the case of the Crown less favourably for it than I would that of an individual? On the contrary, I must judge more favourably for the Crown; and whatever may be my impression as to the intention of the Secretary of State, either when he required the alteration of § 29 of Ord. 14, 1845, or, when he gave the Royal approval of Ord. 32, 1846, this case must be decided on general principle, applicable not to this case alone, but to all future cases. I must therefore hold that the Crown had not parted with the power to disallow Ord. 14, 1845, by the terms of the Secretary of State's letter; and that by refraining from approval of the rest of the Ordinance, the Crown reserved to itself the exercise of that power until it should receive from the Colony an enactment working the alteration it required; when, and not till when, it would signify its pleasure as to the rest.

If this Court were to decide otherwise, see what would happen as to Art. 31 of the Royal Instructions requiring the Governor to transmit to the Chief Justice a transcript of the signification of the Royal pleasure in order to its being recorded. Where and how is the Governor to find the Royal pleasure as to Ord. 14, 1845? Is he to play the lawyer first, and argue out an inferential assent from the assent to Ord. 32, 1846? Is it to be said that the assent of the Crown is ever to be found *in nubibus? Non constat* that the Crown when it approved of the Ordinance of 1846 had not in mind that the Ordinance of 1845, without which that of 1846 could not subsist, had only fourteen months to subsist, and meant in fact that neither Ordinance should subsist longer than that period. It by no means follows, however, that this Court imputes to the Crown an ineptitude in approving of the Ordinance of 1845.

But it is said, this Court is not entitled to know of the existence of the Secretary of State's letter, and is bound to administer every Ordinance duly published till its disallowance is formally signified, and that the Court is not bound to know what is not formally before it. It is no doubt true that the Court merely by accident came to the knowledge that the Crown had not consented to the Ordinance of 1845, and that Ord. 21, 1846, requires this Court to proceed on every Ordinance duly passed and promulgated. Still, when this Court does come to the knowledge, however derived, that the Crown has not assented to an Ordinance, it is bound, under the terms of the Royal Instructions, which are law to the Court and the Colony, to hold that the Ordinance has ceased to have force or effect. The Chief Justice, desiring to know on behalf of the Court, whether an Ordinance in regard to another matter had been confirmed, makes this enquiry of the Governor, and gets a little more information than he asked for. The Lieut.-Governor informed him that there were a number of Ordinances which had not been confirmed, and that this of 1845 was among them. When the Court has this information communicated in so authentic a manner, it is impossible that it can disregard it, or act under an Ordinance which is thus shown not to have any force or effect.

WYLDE, C.J.—I very much regret that there is not an unanimous judgment, but the judgment of the Court must be, that we must decline to hear this case.

LONG & CO. *vs.* MUNNIK AND VAN DER BYL.

Contract.—Rate of damages for breach.

The plaintiffs, merchants in Cape Town, entered into a joint speculation with defendants under which plaintiffs advanced the money for the purchase of certain raisins and were to have control as to sale; the raisins were delivered in Cape Town by defendants, but the greater portion were placed in a store belonging to one of the defendants, who kept the key. The plaintiffs sold the raisins to R. at 5¾d.

per lb., but the defendants refused to deliver. R. sued the plaintiffs for damages for non-delivery, and, the market-value of raisins having risen, the plaintiffs paid R. damages at the rate of 8d. per lb., together with costs incurred, and thereupon sued defendants to recover the amount paid. The Court found that the highest market value between the date of sale to R. and payment of damages, was 6¾d., and gave judgment for damages assessed at that rate and also for the costs of R., paid by plaintiffs.

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The defendants were summoned in an action for damages through breach of a contract. The declaration stated that in April, 1853, at Cape Town, it was mutually agreed between plaintiffs and defendants that they should enter into a speculation to purchase raisins on joint account; that under such agreement the defendants purchased raisins at Worcester and elsewhere, and a portion, viz., 42,754 lbs., Dutch weight, were deposited in a store in Hout Street, Cape Town, and it was further agreed between the parties that the plaintiffs, who carry on business in Cape Town, should have the management of the speculation and sell on joint account the raisins for such price and on such terms as they should consider most advantageous. And that afterwards, about July 8, 1853, at Cape Town, the plaintiffs in pursuance of the agreement and in the best exercise of their discretion, sold to J. Wilson and to S. Rudolf the said raisins at the rate of 5¾*d.* per lb. gross Dutch weight, being the highest price at the time obtainable, of which sales the defendants had notice. And that afterwards the defendants, who had obtained possession of the key of the store in Hout Street, where the raisins were deposited, and which key at the time of the sales was in plaintiff's custody, refused to deliver it up or to allow the raisins to be delivered. And that on July 21, 1853, Wilson and Rudolf commenced proceedings against the plaintiffs for delivery of the raisins, or for damages for non-delivery, of which actions the defendants had notice, and that on August 18, 1853, the plaintiffs in order to stay proceedings paid to Wilson and Rudolf £400 16*s.*, being damages sustained by them for their loss of market in consequence of non-delivery of the raisins, the market value having in the interval between July 8 and August 10 risen from 5¾*d.* to 8*d.* per lb., together with

£18 1*s.* 2*d.*, being costs incurred by Wilson and Rudolf in the said actions. Wherefore the plaintiffs prayed that the defendants might be condemned to pay the sums of £400 16*s.* 4*d.* and £18 1*s.* 2*d.* with costs.

The defendants pleaded the general issue.

The facts stated in the plaintiff's declaration were proved in evidence, except as to the rise in price of the raisins to 8*d.* per lb.

The raisins were sold by plaintiffs to a broker on account of Rudolf and Wilson, and the bought and sold notes were made out as follows: "J. F. Long & Co. to S. Rudolf. The half of their stock of raisins . . . . payment by bill at six months."

Ebden (with him *Watermeyer*) for the plaintiffs.

Porter, A.G., for defendants, contended that the rate of damages should be taken at the time of delivery, if the contract was fulfilled, and referred to *Norden* vs. *Shaw* (2 Menz. p. 150), *Roscoe on Evidence* (7th ed.), pp. 12, 18.

THE COURT held that on the evidence it was clear that the plaintiffs and defendants had entered into a joint speculation with respect to raisins for the purpose of which plaintiffs advanced the money and which were, as far as the sale was concerned, under their control. Large deliveries of raisins were made in Cape Town by the defendants to the plaintiffs, part of which were held in plaintiff's stores, but the larger proportion in a store hired by Munnik, one of defendants. On July 8 the plaintiffs sold their whole stock of raisins, including these latter, to Messrs. Rudolf and Wilson (at 5¾*d.*, the highest price which had till then been given in the market), who had entered into a speculation to purchase all the raisins in the market. After this, raisins rose still higher in the market. Mr. Munnik got possession of the key of the store in which the raisins were kept and refused to deliver.

The plaintiffs were sued by Rudolf and Wilson for damages for non-delivery; and raisins having risen considerably, paid them at the rate of 8*d.* The Court considered that the highest market price of the raisins between the date of the sale and the payment of damages was 6¾*d.*, and gave judgment for the plaintiffs for £178 2*s.* 10*d.*, together with £18, costs incurred in the actions brought against the

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plaintiffs by Rudolf and Wilson, and costs of the present suit.

MUSGRAVE, J., said that as to the objection raised by the defendant upon the sale-notes, it was competent to the agent to sell in his own name, and there was no difference in this respect between a limited and general partnership, and that there was no difficulty in bringing an action of this sort under the Civil Law.

[The following authorities were referred to :—*Storey on Partnership*, §§ 115, 152, 164, 192, 332, 352; *Harrison's Digest*, p. 1571; *Inst.*, pp. 573, 578; 2 *Starkie on Evidence*, pp. 572–576; *Collyer on Partnership*, pp. 32, 190; *Voet*, 17, 2, 9; *Roscoe on Evidence* (7th ed.), p. 11; *Gouthwaite* vs. *Duckworth*, 12 East, p. 421; *Venning* vs. *Leckie*, 13 East, p. 7.]

[Plaintiffs' Attorneys, FAIRBRIDGE, HULL & MEINTJES. Defendants' Attorneys, J. & H. REID.]

HOFMEYR, NEETHLING'S CURATOR *vs.* DE WET, NEETHLING'S EXECUTOR.

1853 Feb. 22–28. March 1. Aug. 9. Hofmeyr, Neethling's Curator vs. De Wet, Neethling's Executor.

For report of this case, see Buchanan, 1868, p. 317.

STEYTLER, CANNON'S TRUSTEE *vs.* NORDEN.

1853. Nov. 22. Steytler, Cannon's Trustee vs. Norden.

For report of this case, see Buchanan, 1869, p. 322.

MULLER *vs.* WHITEHOUSE.

Provisional sentence.—Summons.

Provisional sentence granted on an undertaking to pay a sum by instalments, the condition being that the whole should be due in case of failure to pay one or two instalments; the summons alleging failure to pay two successive in-

stalments, but not averring the particular instalment wherein default had been made. [BELL, J., diss.]

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Muller *vs.* Whitehouse.

Provisional sentence was claimed on an underhand bond dated December 17, 1852, signed by defendant acknowledging himself to be indebted for £50 for cash lent, to be repaid by monthly instalments of £5, payable on the first day of each month, the first instalment to be due on January 10, 1853. The document, after setting out the above facts, concluded as follows:

"Should I however fail in the due payment of one or two instalments on the day they become due, Plaintiff to have the right to demand the whole or the as then unpaid balance."

The summons claimed the whole amount less £5 by reason of the said defendant having failed in the payment of two instalments in succession.

Porter, A.G., for plaintiff.

Defendant in default.

THE COURT (BELL, J., diss.) considered the averment generally of default, and thus of liability to pay the whole amount, sufficient, and decreed provisional sentence.

BELL, J., considered the summons faulty as not averring the particular instalments in which default had been made.

[Plaintiff's Attorney, C. J. BUISSINNÉ.]

ROBBERTSE *vs.* HARBIN.

Provisional sentence.—Promissory Note without date as to year.

Provisional sentence granted on a promissory note payable one month after date, and dated "December 22," with no date as to year: there being evidence that the note was presented to defendant on October 8 "last," and that he then promised to pay it. [BELL, J., diss.]

Provisional sentence was prayed upon a promissory note dated "December 22," and signed by the defendant in

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favour of the plaintiff: there was no date as to the "year:" the note was made payable one month after date. The summons was served on defendant personally on November 23, 1853, and the sheriff's return stated that defendant's answer was, "I will pay it."

The affidavit of the notary J. C. Hofmeyr, sworn on December 30, 1853, stated that the note was presented to defendant on the 8th of October *last*, and that he received answer from the defendant that he would pay the note in two days from that date.

Interest was claimed from January 22, 1853.

Hofmeyr for plaintiff.

Defendant in default.

THE COURT (BELL, J., diss.) granted provisional sentence.

[Plaintiff's Attorney, J. H. HOFMEYR.]

WEEBER *vs.* VAN DER SPUY.

Ord. 7, 1843, § 9.—*Rules and Regulations of Dutch Reformed Church.—Ord.* 33, 1827, § 3.—*Magistrate's Jurisdiction. —Meeting of Consistory.—Slander.—Privilege.—Onus of proof of malice.*

Plaintiff was a member of the Dutch Reformed Church and defendant was an elder thereof. At a "meeting of churchwardens," at which the Minister of the Church, and nine laymen were present, defendant reported that there was a current rumour imputing to plaintiff improper (or indecent) conduct with A.'s wife. Defendant did not at the meeting say from whom he had heard the rumour, but subsequently told the minister that he had heard it from R. and that it had been enquired into by one Kinnear, a Justice and Clerk of the Peace, and found to be groundless. The charge was recorded in the minutes, and a committee consisting of the minister and defendant appointed to investigate its truth, and report to the Consistory. Plaintiff appeared before this committee and asked defendant from whom he had heard the rumour; defendant said

he had heard it from R., but refused to give any other names. Defendant did not tell the minister or the meeting above referred to, or the plaintiff, that R. had told him that the charge had been enquired into by Kinnear, and found to be groundless, but at the trial he admitted that R. had told him this at the time of making the imputation. Before any action had been taken by the Consistory, plaintiff sued defendant before the Magistrate for damages for slander. Defendant excepted to the jurisdiction. The Magistrate over-ruled the objection and gave judgment for plaintiff. On review THE COURT *(by a majority;* WYLDE, C.J., *diss.) reversed the Magistrate's decision.*

Held *(per* MUSGRAVE, J., *and* BELL, J.): *that the occasion was privileged by virtue of Ord.* 7, 1843, § 9, *and that proof of express malice, the onus of which was on plaintiff, had not been made; and*

That the meeting at which the report was made must be regarded as a meeting of Consistory.

(Per WYLDE, C.J.) *That the facts above specified were sufficient evidence from which to infer malice on defendant's part, and rebut the case of privilege; and*

That the meeting was not proved to have been a meeting of Consistory.

(Per WYLDE, C.J., *and* BELL, J.) *That the Magistrate rightly over-ruled the objection to jurisdiction.*

(Per MUSGRAVE, J.) *That the Magistrate had no jurisdiction, under Ord.* 33, 1827, § 3, *rights in future being bound.*

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This was an application for the review of a judgment of the R. M. at Beaufort West in an action of slander wherein plaintiff claimed £10.

The defendant pleaded that he was not amenable in the present case to a Civil Court, he having acted according to Art. 4 of Ord. 7, 1843 (sanctioned by Home Government on November 11, 1851), in his capacity of elder of the Dutch Reformed Church at Beaufort, and he therefore objected to the jurisdiction of the Court.

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The Magistrate over-ruled the objection.

For the plaintiff, Mr. Frazer deposed: "I am Minister of the Dutch Reformed Church here; I remember a meeting of the churchwardens here on May 2. There were present myself, the defendant, Cornelis Raath, and eight others. At that meeting defendant said: 'Broeder Weeber berigt dat er een gerucht in omloop was dat een lidmaat der gemeente Cornelis van der Spuy, beschuldigd werd door Frans Apollos, wegens een onbetamelyk gedrag met zyn vrouw.' This stands in the minutes. At the meeting defendant did not say from whom he had heard the report. After having stated this, defendant asked me if I had not heard it. I said 'No.' As far as I can recollect, defendant gave no particulars of the charge at the time. I cannot remember whether defendant at the meeting said anything about the case having been investigated by Mr. Kinnear, as public prosecutor, or in any other capacity, and plaintiff declared innocent. Two members of session were, according to church usage, appointed by the churchwardens as a committee to enquire as to the truth of the report. This committee has to report to the session at the next meeting in July next, as to what they have done. The session has then to decide whether any further steps shall be taken in the case or not. The committee appointed were defendant and myself. This committee invited plaintiff privately to the manse. There were present myself and defendant. Plaintiff attended. The very words of the minute were brought to his knowledge. The object was twofold: first, to make plaintiff acquainted with such a report being in circulation, and second, to inform him that if the report be found true, he would make himself amenable to church discipline. The great object was to hear his statement. Plaintiff said something, and defendant acknowledged that he had made the report at the meeting. Plaintiff asked defendant from whom he had heard the report. Defendant replied that he had heard it from Raath. I had previously heard from defendant that the matter had been enquired into by Mr. Kinnear, but I had added that it had been done with closed doors, and that it was therefore not satisfactory to me either as a minister or a member of the commission, and that I regretted it had not been with open doors. Plaintiff insisted on being told by defendant who the persons.

were who had spread the report besides Raath, but defendant declined to give any other names. He neither admitted nor denied that there were others. I remember plaintiff pressing upon defendant that as the report was said to be in "algemeene omloop" (general circulation), defendant must have heard it from other persons. Defendant's answer was neither in the negative nor affirmative. Defendant told me privately, perhaps also before, but certainly after, the interview with plaintiff, that Raath had said that further information could be obtained from Plaatje. Defendant did not tell me that when Raath communicated the information to him, he, Raath, also stated that there were no grounds found in the charge by Mr. Kinnear, nor do I recollect defendant having said this to plaintiff. All that the committee at the interview with plaintiff had to report was the plaintiff's reply, in answer to what had been told him. I did not state to plaintiff what our report would be. It is not the usage of church committees to give any opinion as to the merits of questions before them. The committee have taken no further steps in the matter and previously to the meeting of the sessions they intend to take none. At the meeting of session the committee give in their report to the meeting, and it depends upon the meeting whether an enquiry shall be instituted in the case. The meeting will not, upon our report, judge of the innocence or guilt of plaintiff, but only whether any further steps shall be taken. The committee were merely appointed to speak with plaintiff. If defendant had stated to the church session that he had heard from Mr. Raath that Plaatje had said that Apollos had accused the plaintiff of having had connexion with his wife, and that an enquiry had been made by Mr. Kinnear in the matter, if he had said "with open doors," the report would not have been noticed: but if he had said "with closed doors," it would have been. At the church meeting Mr. Raath, to the best of my recollection, assented to what defendant said about the report, but no explanation was entered into. I know Frans Apollos, and if he had appeared at the meeting, he would have been heard, although he is neither a member of the church nor a Christian. I am not aware of having said to the plaintiff that we were not at liberty to receive accusations made by heathens against church members. It often happens that complainants are

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appointed upon church committees. The church regulations have a provision that if a report be found groundless, the complainant is admonished, or censured, so that if this report be found groundless, defendant is subject to admonition or censure."

Defendant admitted that Raath had told him that he had heard from Plaatje that Frans Apollo had accused plaintiff of having had connexion with his wife, and that the case had been enquired into by Mr. Kinnear, but found groundless, and that this was before the complaint was brought before the church court by him, defendant.

Defendant called no witnesses. The Magistrate gave judgment for the plaintiff for £5 with costs.

The proceedings were brought under review upon the ground that the judgment was contrary to law, "inasmuch as the supposed defamatory words alleged to have been uttered by defendant were proved to have been spoken by him *bonâ fide*, and without malice, at a meeting of the Consistory of the D. R. Church at Beaufort in reference to and upon the occasion of a certain alleged scandal relating to the said Van der Spuy, and protected by law, and more especially by § 9 of Ord. 7, 1843." Mr. Kinnear was a J.P. and Clerk of the Peace for Beaufort West, and he also appeared in the R. M. Court as plaintiff's agent.

Porter, A.G., for appellant, relied upon § 9 of Ord. 7, 1843:—

"And be it enacted that no person or persons composing, complaining to, or giving testimony before, any duly constituted judicatory of the said church, shall be liable to any action, suit, or proceeding at law, civil or criminal, at the instance of any member of the said church, for or on account of any matter or thing written or spoken by any such person or persons *bonâ fide*, and without malice, in reference to, or upon the occasion of any scandal, offence, or other matter, real or alleged, which, by the rules and regulations of the said church for the time being, should be reported to any such judicatory, and which any such judicatory is empowered to investigate, nor shall any action, suit or proceeding at law be instituted for the purpose of preventing any such judicatory from pronouncing in the case of any scandal or offence which shall be brought before it, and proved to its satisfaction, such spiritual censure as may, in that behalf, be appointed by the said church, or for

the purpose of claiming any damages or relief in regard to such censures, if the same shall have been pronounced." See also Arts. 37 and 110–117. It is clear that the meeting referred to by Mr. Frazer was a meeting of Consistory, though he employs erroneous terms. The words were spoken under circumstances rendering them privileged, unless express malice be proved, of which no attempt had been made. The plea was clearly wrong, as it should have been a plea in bar; but in substance it is a good one, though as a plea to the jurisdiction it is indefensible.

Brand, C.J. (with him *Watermeyer*), for respondent, contended that the evidence did not establish that the words were spoken at a meeting of Consistory, and where privilege was relied on it must be strictly construed: further, that defendant's malice was shown in the *suppressio veri* at the meeting, where he did not state that the charges had been enquired into and found groundless.

Placaat of 1673, vol. iii. p. 596, shows the culpability of a man who makes a complaint without naming his authorities.

[BELL, J. *White* v. *Pilkington* was decided upon that *Placaat.*]

Watermeyer on the same side. The action is not against a church court, but against an individual who happens to be a member thereof. It is clear that § 9 gives this court jurisdiction, even if it had none independently of the Ordinance. Under this Ordinance, Consistories and Presbyters are exactly in the same position as commissioners and ward masters under the Municipal Ordinance.

[BELL, J. What do you say to § 8?]

The meaning is, that the rules and regulations cannot affect even those who have subscribed to them, beyond the proper mode of carrying them out, which is subject to this Court.

[MUSGRAVE, J., referred to § 3 and Art. 116.]

The Church Ordinance is law for the Church and its members, just as the Municipal Ordinance is for the Municipality. The Magistrate as a juror must be taken to have found from the evidence that Weeber was acting maliciously.

Porter in reply.

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Posteà (Feb. 14th),—

WYLDE, C.J. (after referring to the inability of the Court to remit the case to the Magistrate, the only power of the Court being either to set aside the judgment or correct it by an absolute sentence, said): If this be so, it behoves the Court, I have always conceived, to be cautious how we interfere with the Court below . . . . The summons states the plaint, and an objection is taken in respect to the words complained of having been spoken in a Consistory Court. When this case was first mentioned in Court, having looked at it in Chambers, it struck me as very uncertain whether this was a Consistory Court or not. I am still of the same opinion, but there can be no doubt that it is not proved to be a Consistory Court. We have nothing before us but mere statement. Mr. Weeber reads § 9, and there rests his case. Now let us see what the words complained of were . . . . In our proceedings we must take it according to the plaint, but if the plaint is more fully reflected by the evidence, then we cannot exempt ourselves from considering the stronger version of the words which the evidence supplies. What the Court have to look to is, whether the words be slanderous, and, if so, there can be no question that they are the subject of an action, as tending to degrade, defame, and lower appellant in the esteem of his fellow-citizens . . . . The plaint is objected to by Weeber in the following form (plea read). Now evidently what defendant meant was, not that he was not amenable, but that he had a bar to the action, being within the protection of that particular clause. But it behoves the Court, while they give such protection where it is justly due, to beware that it be not converted into a means of heaping injuries upon the heads of others. Mr. Attorney-General admits that this should have been the form of the plea, and, indeed, that any constituted body, authorised and created wholly and solely, under an Ordinance of this Colony, is amenable to the Courts of this Colony, cannot be seriously doubted. Is this disrespectful to that learned and reverend body? By no means. The Court has not taken this power. They come themselves to the legislature, and, having got what they consider sufficient protection, they bind themselves to certain determinate conditions, restric-

tions, stipulations, and regulations, with regard to which the Court is entitled to see a due administration; and the administration of their Church can only be carried on while the Court does its duty, as long as they adhere to the regulations so enacted at their request and sealed with their assent. I know of no case in which the Court has interfered or ever will interfere with regard to the adjudication of cases by Church Courts, let them be right or wrong. But the way in which the Court is called upon to see that the regulations are conformed to, is the same as that which obtains in reference to those of the Municipality. The Municipality is not a voluntary association comparatively. The Dutch Church is a voluntary association, and whatever powers the Court exercises in respect of its regulations have been conceded by the church itself. I know not therefore how it might be presumed that the appellant was not liable to any civil action because he was acting as an elder of the church under Ord. 7, 1843. This was a case of words spoken by an elder of the church, and by the regulations an elder is bound, if he hear scandal of any member, to mention it. But, then, what is he to mention—what is he to have on record? Partially what he hears, or is he, as elder or member of the congregation, to report the whole? He is to make a statement *bonâ fide* and without malice. Can this be held to be the case if he only tells a part of what he heard? If I repeat only part of a statement, materially modifying its impression, am I to be protected in it? We will see more particularly when we come to consider the terms, how this affects the question. Let a member of the church come in and tell all he has heard, and he is protected, even although there may be malice in the heart which you cannot see. But in such a partial statement malice is presumed by the law. Suppose you tell me of a man supported between two persons, whom you at first thought to be in a state of intoxication, but afterwards found to be suffering from indisposition, and if I repeat that statement, but only tell one half of it, can it be said that I speak *bonâ fide?* The law says, in making such a partial statement, you have acted with a malicious purpose. This is not a scandal that hangs on repetition from mouth to mouth. It is not only from Plaatje to Weeber, and from Weeber to Mr. Frazer. No, this is before a Court—a

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judicature, to which alone the provision of the Ordinance applies. I think it is hardly necessary to dwell upon the protection sought for as to the power of the Court. The protection the defendant seeks is dependent on the Ordinance. It must receive a legal construction, and that legal construction must be fixed by the Court. The case with me is, why did Weeber not state all the facts? If you take cognisance of a Common report you must tell the whole or be subject to the imputation of acting maliciously. I feel that I should not hastily decide against a Magistrate's judgment; and it becomes of importance in my mind to watch this case in order that it may not be made an argument in other Consistories under similar circumstances. Here is no right or title involved, nothing can be decided from this case that would increase or decrease the power of the D. R. Church. It is a mere question of loss or damage; and I can see nothing, therefore, but an action for damages on the merits, for it is quite clear to me that there cannot be a question raised as to the competent jurisdiction of the Magistrate. Here was a scandal reported to the Consistory, that Van der Spuy had acted improperly with another man's wife, and it might be that the members were naturally anxious to remove such a stigma from their community. I should like to see the minute-book. Who wrote it? Who composed the Consistory? The names are given here, but what positions the parties severally held we do not know. Is it a consistorial meeting? Is it a meeting of elders? Is it an ordinary or a special meeting? All this is left in doubt; and yet the Court is called upon to give protection to a man who has given evidence to a judicatory establishment. Surely the Court should know that it is a judicature. . . . . The defendant admits that before he brought the complainant before the church court he had been told that the case had been enquired into by Mr. Kinnear, but found groundless. Is that placed on the minute-book of the Consistory? No. He placed there that there was "a report in circulation," which means a common rumour. Now can what A. tells B., and he tells C., be a rumour in circulation? It might have been told by these parties in whispers, in the shade of the forests. Can we give it as a *bonâ fide* ground which shall warrant Mr. Weeber in placing it on the church minutes? What could

move him to give such a report as this, omitting to state that it had been inquired into and found groundless? Is he to protect himself under the plea of a *bonâ fide* statement of fact when he had not told the whole? My opinion is, that, not having stated to the meeting that the report had been enquired into, and found groundless, he has not made a *bonâ fide* statement; and this being the case, I can find nothing that enables me to say that the Magistrate's judgment is wrong. Looking at the Ordinance it is odd how the preamble strikes from under one all ground of question as to the jurisdiction of the Court. [His Lordship here read the preamble to Ord. 7, 1843.] The Dutch Church have no law, but in this Ordinance, which they can apply in relation to their congregation, their duties or their rights; and so careful have they been to fix themselves to some determinate rule, that they can make no regulations repugnant to those embodied in this Ordinance. They are prohibited as much from making rules inconsistent with these regulations, as they are from bringing into operation rules which have been repealed. This contains the body of the law which is to regulate the proceedings of the D. R. Church; and if there is a rule laid down in this law, which is departed from to the injury of any individual, no one must be surprised, if complaint is made to this Court, that I shall enforce them to keep to that rule. And I say not this of the Dutch Church alone. I care not what church is referred to—if any individual is robbed of natural and civil rights by the conduct of a minister of a church, when he is bound only to act in a certain course ministerially—as far as my office goes, if redress can be given, it shall be found in the Supreme Court. So far as that redress in respect of the English Church may be found in the Ordinary, or there being no Ordinary, in the Governor, I am happy to be relieved of such jurisdiction; but if there be no other resource, I read my Charter of Justice—and there I find that any matter of grievance between man and man in this Colony must have a remedy here, if such remedy may not be found in other jurisdiction.

[His Lordship read § 9 of Ord. 7, 1843, and continued:] The "duly constituted Court" here referred to must proceed in the duly constituted manner. And how am I to read *bonâ fide*? It must be *bonâ fide* with real truth and without

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malice. Why should a man be protected who has not told *bonâ fide* what he has heard? Mr. Weeber told at a church meeting a part only of something he had heard. I say he had no excuse for not repeating all that was stated before the Magistrate: and this is such a proof of his ill-will as necessarily makes me think the Magistrate did right in giving the redress prayed for. . . . . Rule 135 states, "Except for serious public misdemeanours, the three last means of reproof are not employed, until one of the others has been used in vain, and they are followed by a suspension or deprivation of such privileges or benefits as are connected with being a member." The "three last means" are, a denial of the Lord's Supper, first, for a limited time, secondly, for an unlimited time, and third, an entire excommunication. Rule 137 declares that "When a charge is brought, or information given against any one before the consistory, they shall, if they find reason for so doing, appoint a committee to make enquiry about it." Now what "reason" did the consistory find? Mr. Frazer says, Mr. Weeber having made a certain statement, they appointed a committee "which has to report to the next session in July next as to what they have done. The session has then to decide whether any further steps shall be taken in the case or not." But the rule says (138), "If the consistory, after hearing the report of the committee, are of opinion that they are to proceed further in the affair, they shall interrogate the accused." Here they do this in the first instance. Why do they first put him to the torture? Here again, I say, there has been a mistake. Then comes a regulation (140) requiring that if the accused deny the charge, he shall have notice, and a period of fourteen days be allowed for him to defend himself before the consistory; and again (145) "The consistory shall always hasten as much as possible the decision of cases." Now the case takes place in May. We all know the limits of Beaufort. The meeting might have been called and the matter decided in seven days,—and yet here the man is still under the ban of the consistory. Here is a great hardship. It must be said that Mr. Weeber has acted injudiciously. He admits that he made a misrepresentation, calling that a current report, which is only a common statement. Now what will this case go to shew? Will it interfere with the proper working of any Church Judicatory? No. Will it

interfere with any other case? No; another case must be decided like this, on its own merits. What, then, will it do? It will remind consistories that they must proceed according to rule; that they must hasten their decisions, but not hurry too much to take up a report like this and act upon it with such terrible severity; that they should pause and enquire before they enter it on their proceedings, and leave a man under the effect of judgment for so long a time as endured in this case. I have no desire to restrict the liberty that belongs to the D. R. Church, in regard to its judicatories; but I say again, if this had come before me I should, of course, have called for proof in a duly constituted Court; I should not have taken it for granted, and no such proof has been offered. I again say, this is a case entirely by itself, although it has relation to the development of certain principles and the correction of errors, I trust not too widely diffused. . . . . Under all the circumstances of the case I am for confirming the judgment of the Resident Magistrate, with costs.

MUSGRAVE, J.:—I am of opinion that this is a case which ought not to have been entertained by the Resident Magistrate of Beaufort. The Ord. 33, 1827, § 3 enacts that "the Resident Magistrates shall have jurisdiction in all civil cases within the districts and places for which they are appointed respectively, wherein the sum or matter in dispute shall not exceed the amount or value of £10 sterling, and wherein the title to any lands or tenements, or any fee, duty, or office is not in question, and whereby *rights in future cannot be bound.*" This provision in the Ordinance grows out of the reservation which is prescribed by § 48 of the Charter of Justice, and is embodied in the rules which were subsequently made respecting the manner and form of proceeding in the Courts of Resident Magistrates in the following words: "Provided the title to any immovable property, or any fee, duty, or office, or any *right* be not *in dispute*, but only the alleged injury and the damage sustained thereby. [The learned Judge here referred to provisions of a like nature in inferior Courts of Great Britain, and then recited § 3, 4, 6, 8 and 9 of Ord. 7, 1843, and then read from the schedule Arts. 1, 2, 3, 110–117, 132, 134, 146, 183, and continued:] It has long been considered as a *settled principle* in the temporal Courts of Great Britain, that the Canons of the

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Church of England are not binding upon the *Laity*, unless they are confirmed by the authority of the British Parliament; and I presume that it was in accordance with that principle that it was deemed expedient that the regulations of the Dutch Reformed Church should be established by a legislative enactment. Those regulations, standing thus established by a local Ordinance, must necessarily be regarded by this Court as constituting, as it were, a *special charter* of the rights, liberties and powers of the Dutch Reformed Church of this Colony, which it is the bounden duty of the Judges most guardedly and scrupulously to maintain and uphold as inviolable so long as it shall continue to form a part of the law of the land. That law has declared that that church should be invested with the power of regulating its own internal affairs, and that the General Assembly or Synod of that church is the *natural and proper ecclesiastical authority* by which rules and regulations for its government in its own internal affairs may rightfully be made. Particular rules and regulations have been made by that body, which are contained in the schedule to the Ord. 7, 1843, and that body stand empowered to modify them under *certain restrictions;* and, if the abuses in the working of the machinery of the system of church government and discipline which they have prescribed be really of so flagrant a nature as they have, in the course of the argument in this case, been so vehemently represented to be, it is to be hoped that the public voice of the respective congregations will imperatively call for, and coerce the Synod into making the necessary reforms in the procedure of the Church Courts. But, should that body obstinately disregard the united remonstrances of the members of the community, recourse must, of necessity, be had in that painful extremity, to an appeal to the sympathy and supreme local authority of the members of the new Parliament. It is not competent to this Court to apply any effectual remedy to the *evils* which are the subject of complaint, as we sit here for the purpose of *expounding and administering the law as it stands*, and are not at liberty to *abrogate and amend it, or to strain it*, to meet the exigencies of any particular case.

If the Church Courts shall, on any occasion, transgress the limits which have been assigned to their jurisdiction, or be guilty of any palpable abuse of their legitimate powers,

in derogation of the civil rights of the members of the respective congregations, they will, under the terms of the Royal Charter of Justice, and the common law of Holland, be clearly amenable to the control of the Judges of the Supreme Court; and they can have no just cause to complain of being so placed under the superintendence of the superior temporal Judges, when the *ecclesiastical authorities* in England are in the same position, and subject to writs of mandamus and prohibition. While they continue to act within the scope of their lawful authority, and abstain from violating the principles of public justice in their proceedings, they are not *personally* responsible for *errors in judgment* to this or any other tribunal. In England the ecclesiastical law is administered by Doctors of Civil Law, who are specially appointed for that purpose. In this Colony we have no such professional Judges of Ecclesiastical Courts, and the Church Courts which are formed under the Church Ordinance may be considered as virtually standing *in their place*, in regard to the members of the community of the Dutch Reformed Church. As far as other congregations are concerned, the Supreme Court is an ecclesiastical one, in one of the branches of its jurisdiction. The church regulations give to all persons who hold themselves aggrieved by the decision of a Church Court, *a right of appeal to a superior one.* If any member of the congregation is dissatisfied with the decision of the consistory in any case of prosecution for acts of immorality, he must, I conceive, go through the *regular channel of appeal*, which is prescribed by those regulations, and is not at liberty to *withdraw his case from the adjudication of the spiritual Judges, because he may prefer its being brought to a hearing before the Supreme Court.* If any clergyman abuses his spiritual authority, or otherwise disgraces his sacred calling, he may be prosecuted before the Synod with a view to his suspension or removal from office, under Art. 183 in the schedule; but so long as he acts conscientiously in withholding the sacrament, or using any other means of reproof in the exercise of church discipline, in the *name of the consistory* under Art. 134 in the schedule, he stands safely protected against any personal aggressions from any unworthy members of his congregation, by the terms of § 9 of the Ordinance. *Ne sutor ultra crepidam.* . . . . . I have felt it incumbent upon me to express myself as fully as I have done

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upon the provisions of Ord. 7, 1843, in order to obviate any misconception of the view which I entertain in regard *to the interference of the Judges of this Court* with the proceedings of the Church Courts, and it now remains for me to observe upon the merits of this particular case under review. There is but a loose record before us, but I am not in the habit of looking with a critical eye at the manner in which the pleadings are drawn and the evidence taken in the Courts of the Resident Magistrate provided I see enough of the substantial merits of the case to enable me to form a competent judgment upon it. The person who is stated to have been aggrieved by an act of adultery committed by the respondent, appears to be in a very humble condition of life. The respondent is a member of the congregation of the Dutch Reformed Church at Beaufort, and, as such, amenable to the jurisdiction of the *consistory* of that division, under § 8 of the Ordinance and Arts. 1, 2,,3 of the schedule. The appellant is an elder of that church and member of the same consistory, and, in the latter character, not only had a right, but was *officially bound* under Art. 117, to bring to the knowledge of the consistory the current report which came to his ears respecting respondent—it was his duty simply to bring it to their knowledge, and leave them to determine as to the propriety of further investigation, and that duty he appears to have performed. It was no part of his duty to signify to them that he had heard that the matter had been previously inquired into by Mr. Kinnear, for, if that gentleman had really done so *with closed doors*, his decision could not have transpired, and if he had done so as a *private individual*, that decision could not have been entitled to such respect from the consistory as to prevent them from examining the charge more strictly. The appellant having thus officially performed his duty in reporting to the proper judicatory what he had heard relative to the respondent's character, the latter thought fit, instead of deferring to the spiritual authority of his own church, to defy its censures and bring an action for defamation against appellant in the Resident Magistrate's Court at Beaufort, in the hope of *overawing* the Church Court, in the exercise of its legitimate powers, *pro salute animi*.

Under these circumstances, the first question for the consideration of this Court is, whether the *right* conferred

by Art. 117 in the schedule is one of the rights specially reserved in Ord. 33, 1827, § 3, as being beyond the jurisdiction of the Courts of the Resident Magistrate. I am of opinion that it is—that the right upon which the Resident Magistrate has thought fit to decide in the present case was not confined to the present appellant, but *belonged equally to any other elder* and member of the consistory of that division, and will continue to belong *to every succeeding elder* and member of that body, and that the Court below has consequently exceeded its powers in entertaining the action.

But it is said that, although appellant possessed the right of preferring a *bonâ fide* complaint against respondent, he was liable to the action, because he acted *maliciously;* and, in support of the allegation of malice, the only fact which has been adduced is the *omission to state* to the consistory when he noted his complaint, that the matter had been already investigated by Mr. Kinnear, and found to be groundless. I have already declared that I do not consider that he was bound to bring that circumstance to the knowledge of the consistory, any more than he would have been justified if he had heard that the *result* of the investigation was *unfavourable* to the respondent, in reporting that fact to them, in order to prejudice their minds against him. There was no proof of anything like a personal animosity between the parties—there was no previous quarrel, no conflicting interest which would have operated as an incentive to the alleged calumny. When called upon to name his authors, he named the person from whom he heard the report, *in the presence of that person*, who gave a tacit assent to the truth of his statement; but he was not disposed, as a member of a Church Court, to allow himself to be catechised by an accused party who assumed a tone of defiance and intimidation before the spiritual judicatory to which the law of the land, and *his own free choice*, as a *member of the Dutch Reformed Church*, had rendered him directly amenable, for the purpose of affording him a facility in instituting a multiplicity of actions. The *presumption of law* was that defendant in the action had done the duty which the church regulations imposed upon him conscientiously, and it was incumbent on plaintiff to prove *express malice* in order to divest him of the protection which he claimed as a member of consistory, under § 9 of the Ordinance.

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Having fully considered this case, and given every due weight to the able arguments of counsel on both sides, I am of opinion that the judgment must be reversed; but as the decision of the Court below was in favour of respondent, and there is a difference of opinion between the Judges of this Court upon the merits of the case, I think that each party should pay his own costs of appeal.

I shall now refer to a few cases in support of the opinions which I have just expressed.

Dean of Jersey vs. *Rector of* ——, 3 Moo. P. C. C., p. 243.
R. vs. *Payton*, 7 T. R. (D. & E.), p. 155.
Carslake vs. *Mapledum*, 2 T. R. (D. & E.), p. 473.
Starkie on Evidence, vol. ii. p. 462.
Van der Linden Inst., p. 392.

BELL, J.:—Though I agree pretty much with the Chair as to the rules and principles of law which should regulate the decision of this case, I am sorry I have not been able to bring my mind to take the same view as the Chief Justice of the effect of the evidence. [His Lordship here stated the pleadings, and referred to their insufficiency and inartificiality, and continued:] We must engraft into the defence the section of the Ordinance on which it is founded, and read it as if it said that defendant had used the words complained of, while "composing part of, or complaining" to, or "giving testimony" before "a duly constituted judicatory of the Dutch Reformed Church," and that before it the words had been spoken *bonâ fide* and without malice, and therefore defendant was not amenable to a Civil Court. This is the way in which the Summons of Appeal treats the case, and it seems the rational and reasonable one according to the provisions of § 9 of Ord. 7, 1843. The defendant's notion seems to have been that this section exempts Church Courts, their members, and persons appearing before them, from amenability to any Civil Court so soon as they merely allege that what is complained of was done before a Church Court, *bonâ fide* and without malice. It is very true that appellant's counsel, in opening the appeal, said that if appellant's defence had been used in this way (of which I think there can be no doubt) he must disavow it as untenable. It is proper, however, as appellant and his reverend adviser in the Court below seem to have thought that

respondent was not in any respect amenable to the Civil Courts for acts done in a Church Court, that I should say expressly that that is a complete misapprehension of the law, and that every man, whether clerical or laic, is answerable before the Civil Courts of this Colony for whatever he may say or do in a Church Court, to the prejudice of any of Her Majesty's subjects, unless he can not only allege, but prove also, to the satisfaction of these Courts, that he comes within the purview, and is entitled to the benefit of § 9 of the Ordinance. [His Lordship read the section.] This section gives no such exemption as seems to have been imagined by appellant. Indeed, I conceive the section only found its way into the Ordinance *ex abundante cautelâ* to prevent the very suggestion which, as is usually the case when excessive caution in legislation is used, it has, on the contrary, created. The section was intended to intimate that although the laws and regulations in the schedule to the Ordinance were declared to be the laws and regulations of the Dutch Reformed Church, for the time being, yet it was not to be supposed by the members of that Church that, in carrying out these laws and regulations, they would be exempt from liability to the Civil Courts for whatever, in so doing, might be done *malâ fide* and under the influence of malice. Or to put it differently, the section seems to have intended to intimate that in carrying out these laws and regulations of the church, the parties concerned would not be answerable in a Civil Court for what they might do, *bonâ fide* and without malice, leaving the obvious inference that they would be so liable for what they might do *malâ fide* or with malice. Read in either of these ways, the section neither imposes a liability nor gives an immunity, but only gives a caution that the law as it previously existed is left untouched. In order, therefore, to get the benefit of this section, the party pleading it must not only plead that what was done was done in a Church Court, but he must be prepared to prove, so far as the law, independently of that section, lays such a burden upon him, that what was done in the Church Court was done *bonâ fide* and without malice.

The appellant's counsel candidly admitted this to be the correct view of the matter, and abjuring any pretensions to a higher position for his client than that which I have stated to be his true position, restricted the defence to an

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assertion of his right to the benefit of § 9. In other words he wished the defence to be read, as admitting the Magistrate's jurisdiction, and as claiming the benefit of § 9 on satisfying the Court that the words complained of had been used *bonâ fide* and without malice.

I do not think the appellant took this view of the matter in the Court below. I rather think he meant to use his defence as a denial *in toto* of the Magistrate's jurisdiction even to the extent of enquiring whether there had or had not been *mala fides* or malice; and that when the Magistrate over-ruled his defence, as so put forward, he resolved to stand silently by, without going into the merits, indifferent as to the result to which the Magistrate might come, in the confidence that this Court would, upon appeal, maintain for him the immunity which he claimed. It is in this way only that I can account for his not having produced any evidence before the Magistrate's Court, or having even cross-examined Mr. Frazer, respondent's witness.

In these circumstances, if there had not been sufficient in the case to enable me to dispose of it according to the views which I entertain, I would have been disposed, while affirming the Magistrate's judgment, which disallowed the defence as a plea to his jurisdiction, to allow appellant to lead such evidence as he might be advised. But it seems to me it will not be necessary to take that course. The questions for our decision upon this review are, as I conceive:—

1. Has appellant proved that part of his defence which alleges that what is complained of took place in a complaint to a duly constituted judicatory of the Church?

2. Upon whom does it lie to prove that the words of the complaint to the Church Judicatory were used *bonâ fide* and without malice, the concluding part of appellant's defence?

3. Is it proved that the words were used *malâ fide* and with malice?

1st. With regard to the first of these questions, the respondent has proved by his own witness, Mr. Frazer, that the words complained of were uttered at "a meeting of the churchwardens of the D. R. Church at Beaufort" . . . It is reasonable to suppose that the witness, when he spoke of this meeting, had in his mind the duly consituted judicatory to which he had referred in the defence, *i.e.* "a meeting of the consistory," the only Church Court that can consist of only

one clergyman and several laics, as this meeting seems to have done; no other clergyman than Mr. Frazer having been present. If the meeting sworn to by Mr. Frazer be held to have been a meeting of consistory the defence of appellant that the words were used before a duly constituted judicatory of the church is, in my opinion, proved; and the appellant is so far brought within the category which entitles him to the benefit of § 9.

2nd. Upon whom lies the burden of proving that the words complained of were used *bonâ fide* without malice and in terms of § 9?

Now § 8 of the Ordinance declares that the rules and regulations of the church shall affect "such persons only as shall be found in an action or suit before a competent Court, to have subscribed, agreed to, or recognised the said rules and regulations, or some of them, in such manner as to be bound thereby, in virtue of the ordinary legal principles, applicable to cases of express or implied contract." This section does nothing new. It merely expresses in terms what the law would on principle have done without it, but in this respect it is convenient for the present purpose. Before, then, the appellant can have the benefit of § 9, or we can tell whether the burden of proof will lie upon him or the respondent, we must know whether respondent was in any degree bound by the laws and regulations of the church; for plainly, unless he were in some way or other bound by them, § 9 could have no application between appellant and respondent. Therefore it was that I observed in the course of the argument that § 8 was most material. Now is there evidence that respondent in any way subscribed, agreed to, adopted or recognised the rules and regulations of the church? In the first place, appellant pleads, as I before suggested his defence should be read, that the words were used before a duly constituted judicatory of the church; and Mr. Frazer, as I before observed, has proved in the way I have suggested his evidence should be read, that they were used before a Consistory Court. Frazer further proves that "two members of session were, according to church usage, appointed by the churchwardens as a committee to enquire, &c." He says that this committee were himself and appellant, and that they invited the plaintiff privately to the manse—*plaintiff attended*—the very words of the minutes were brought to his

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own knowledge. Plaintiff asked defendant from whom he had heard the report. Plaintiff insisted upon being told by defendant who the persons were who had spread the report . . . . If then respondent was a member of the church he must be looked upon as if he had subscribed and agreed to "the rules and regulations of the church," and as being bound by them "on the ordinary legal principles of express or implied contracts."

In this view respondent had entered into a contract with the D. R. Church, that it and its officers should, so far as he was concerned, enforce observance of its laws and regulations, and that he would conform to these laws and regulations. [His Lordship here referred to Ord. 7, 1843, Arts. 35, 36, div. 7, 37, div. 3, 43, 110, 111, 116, & 117, and continued:] Passing by Art. 117 as being so inaccurately expressed as not to serve the present purpose, there cannot be any question that, taking the other Articles together, it was *the duty* of appellant (a duty recognised by respondent) as a member of consistory "to watch over the morals" of respondent, as an elder, to promote his welfare by instruction and exhortation, and, as a member of consistory, to aim "at the maintenance" of respondent's "purity of morals," and "to keep in view that the superintendence" of the Consistory Court "reaches over all sorts of scandalous behaviour" on the part of respondent or any other member of the congregation. In this situation of appellant and respondent, relatively to each other, the respondent complains to the Civil Magistrate that appellant had slanderously said to a Consistory Court "that there was a report in circulation that respondent was accused by Frans Apollos of improper conduct with his wife," which the declaration says means that he "had had *carnal connexion*" with the wife—an innuendo which, however the evidence in the case subsequently led might warrant it, as to which I shall speak afterwards, the words themselves did not at all warrant. They are "beschudigd werd door Frans Apollos, wegens een onbetamelyk gedrag met zyn vrouw" (was accused by Frans Apollos concerning unbecoming [or indecent] conduct [or behaviour] with his wife). It was assumed in the Court below, as it was at the bar here, that these words are actionable, but I am by no means clearly of opinion that they are so. The appellant's statement is not that re-

spondent had used improper conduct with Apollos' wife, but that there was a report that the husband "*accused*" him "of improper conduct" with her. [After expressing a doubt whether the words were actionable, as different interpretations might be put on them, the learned Judge continued:] But it may be answered all this is idle, for an enquiry before the Church Court plainly pointed to something more serious than anything that has been suggested. I do not see that, for although, if the respondent had not been reported to have done more than some of the things which have been suggested, the report would not support an action of damages against the spreader of it; yet the report might well have justified appellant, whose duty it was to watch over respondent's moral character, in putting the discipline of the church in motion, in order to restrain *levity*, which otherwise might grow into *immorality*. But let it be assumed that the words are actionable. . . . . The law will infer against a defendant malice in the use of such words without putting the plaintiff to prove that defendant intended to do him the injury of which he complains; the injury is the same, whether the party did, or did not, intend to inflict it, and he must answer accordingly. But if defendant justify the use of the words upon the plea of some duty, legal or moral, under which he lay to the party to whom he used them, then the presumption of malice, which, but for this plea, the law would have raised, is at an end, so soon as defendant proves the truth of the plea which he has set up. It is no longer sufficient for plaintiff to prove merely the use of the slanderous words, and to claim, without further evidence, the benefit of the inference of malice, which the law sets up from the injurious character of the expression, which is technically called legal malice, or malice in law. The plaintiff must now go a step further, he must prove that the duty, which is set up as a justification for the use of expressions which are admittedly injurious, was only a cover, and that the true motive of defendant was, not the discharge of this duty, but the injury of him, plaintiff. He must prove now, not only that an injury has been inflicted upon him, but that defendant intended to inflict that injury. He must prove malice in fact, as distinguished from malice in law. Apply these principles to the present case, then the answer to the

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question I before suggested, in regard to the party upon whom lay the burden of proving the affirmative or negative of the proposition "were the words complained of used *bonâ fide* without malice," must be that the burden lay upon respondent of proving the negative; of proving that the words were not used *bonâ fide* without malice, but *malâ fide*, and with malice, and on the ordinary principles applicable to a party put in such a position, he can have no presumptions raised in his favour—these are all given to his opponent. Now appellant was an elder of a church of which respondent was a member, and, as such, appellant was bound to watch over respondent's morals, to promote his welfare by instruction and exhortation, to maintain the purity of his morals, and to superintend his conduct, so as to correct in him any scandalous behaviour. In such a situation a report that respondent was accused of improper conduct with a married woman was a matter which appellant was bound to investigate under the duty under which he lay both to the church of which he was an elder and the respondent as a member of that church. Accordingly appellant pleaded that the words complained of were addressed to a duly constituted judicatory of the church, and the truth of this plea was proved by the evidence of respondent's witness, Frazer, when he said that the statement had been made by appellant to a "meeting of churchwardens," which must be construed to mean a meeting of consistory. Thenceforth the presumption of malice which the law would have raised from the very nature of the words complained of, without regard to the motive with which they were used, was at an end. I am therefore of opinion that the second question, like the first, must be answered in appellant's favour, and that the burden was thrown upon respondent of proving that the statement to the consistory had been made in bad faith, or in malice, with the view of injuring respondent. There remains, then, the 3rd question. Is it proved, which, if the principle I have laid down be correct, it must be done by respondent, how the words were used, whether *malâ fide* and with malice, or *bonâ fide* and without malice? [The learned Judge then discussed the two grounds relied on by respondent as proving malice: his not mentioning the result of Kinnear's enquiry and his declining to give other names, besides Raath's, of those from

whom he had heard the report.] Let me suppose the enquiry to have been whether respondent had connexion with appellant's wife and the result to have been an acquittal; the withholding of this information from the consistory *may be* consistent with the *existence* of malice in the appellant, *but it does not necessarily prove it.* On the contrary, it is equally *consistent* with the *absence* of malice. The report was one thing, the enquiry was another. The one was collateral to the other. It was not as if appellant had told the part of a report unfavourable to respondent, and kept back what was favourable; but having told the *whole* report he kept back a statement as to a collateral enquiry into the truth of the report. This he *might* have done from malicious motives, no doubt, but then it was for respondent, on whom the burden of proof lies, not to argue or deduce, but to *prove* such malicious motive from other circumstances. [The learned Judge here commented at some length upon the evidence as showing that no proof of malice had been made by respondent, and that the facts were quite consistent with any absence of malice on appellant's part, and proceeded:] I will not say whether, if respondent had gone on with the enquiry before the committee, or had gone into further evidence before the Magistrate, as to the conduct of appellant before, during, or after the enquiry, he might not have proved that this proceeding before the consistory was a mere cover for the indulgence of malice against him. But I must say that he has not proved that on these proceedings. I do not think it is proved by either of the circumstances relied on, and I am not at liberty to supply the defect in his positive proof by any presumption in his favour. Presumption, as I before observed, must, in the relative position of the parties, as elder and church member, be in favour of appellant and against respondent. . . . . Though I am of opinion that the case before the Court has not been proved—and I must express the strongest doubts, notwithstanding the old Dutch *Placaat** and the three cases from Holland which were cited, of the authority of this Court to control the Church Courts in the conduct of their discipline, where what is done is done *bonâ fide* without malice—I do not abjure or throw the slightest doubt on the jurisdiction of this Court to

* See *Government Placaat Boek*, vol. iii., p. 435.

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punish any laic or clergyman who shall abuse the powers of the church for the indulgence of his own pride or malevolence to the injury of any member of the church. . . . . I think that the order should be that the Magistrate's decree be affirmed so far as it over-rules the defence of the jurisdiction, but that it be reversed *quoad ultra;* that respondent be ordered to repay the £5 to appellant; that the Magistrate return the deposit to appellant, and that there should be no further order as to costs, on account of the difference of opinion existing.

Judgment of the Magistrate reversed; and judgment ordered to be entered for plaintiff in review. Defendant in review to repay to plaintiff in review the sum of £5. Each party to pay his own costs of suit, as well of the Supreme as of the R. M. Court.

[Attorneys for Plaintiff in review, J. & H. Reid.
Attorneys for Defendant in review, Fairbridge, Hull & Meintjes.]

Ebden vs. Anderson.

Right of Way.—Meaning of "Heirs and Successors" in a grant.

A., the owner of estate "X.," by notarial agreement gave to B., the owner of adjoining estate "Y.," and to "the future proprietors and occupiers" of "Y.," a right of road across "X.," reserving to himself, "his heirs and successors," the right to use this road "with horses and carriages" over part of "Y.": the agreement was annexed to the titles of both estates. The plaintiff purchased one of the lots of estate "X.," which had been divided and sold on the insolvency of A.'s successor: the defendant was the proprietor of that part of "Y." over which the reserved road ran, and claimed a right to obstruct the road: neither plaintiff nor defendant owned the original homesteads of "X." and "Y." Held, *that plaintiff was entitled to the use of the road.*

This was an action to declare a right of road.

The declaration stated that plaintiff was proprietor of Lot

18 of the divided estate "Rustenberg," transferred to him by J. G. Steytler as trustee of the estate of D. J. Cloete on June 19, 1851; that defendant was proprietor of certain 12 morgen of ground, a portion of the divided estate "Rygersdal," transferred to him on December 14, 1848; that on May 16, 1832, it was agreed between W. Fairclough, proprietor of "Rygersdal," and P. L. Cloete, proprietor of "Rustenberg," the adjoining property, in a notarial agreement, that P. L. Cloete should convey to W. Fairclough and the future proprietor and occupier of "Rygersdal" a right of road to "Rygersdal" along the boundary line of "Rustenberg," direct from the main road to Wynberg and adjoining "Zorgvliet," of the breadth of 20 feet, and extending direct to the Liesbeek River; and it was further agreed that the said Fairclough, his heirs and successors, and his or their servants, and all persons coming to and from "Rygersdal," should have a right of way without molestation, and that the said Fairclough, his heirs and successors, should be at liberty to place a bridge over the Liesbeek River, and keep it in repair, and that in this agreement P. L. Cloete, proprietor of "Rustenberg," reserved for himself, his heirs and successors, the right to use the road and bridge with horses or pleasure carriages to and from "Rustenberg," it being agreed that he and they should be permitted to pass over "Rygersdal" in a direct line to the Camp Ground through the fir avenue, but not for loose cattle or wagons, without being liable to charge for repairs or construction of the road or bridge; that a copy of the agreement was registered and annexed to the title-deeds; that the plaintiff is proprietor of a portion of "Rustenberg," and has received transfer, and has a right to use the road and bridge as afore mentioned; that the defendant, the proprietor of that portion of "Rygersdal," in which the fir avenue is situated, has refused plaintiff the use of the bridge and road, and has obstructed the road by erecting a wall and placing a gate. Wherefore plaintiff prayed for a declaration of rights as to his right of way over the road.

Under the notarial agreement of May 16 P. L. Cloete, proprietor of "Rustenberg," in consideration of payment of £60 by W. Fairclough, proprietor of "Rygersdal," sold to him and conveyed to him and to the *future proprietors and*

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occupiers of "Rygersdal," the right of road in the declaration referred to, and agreed that W. Faircloug̃h, *his heirs or successors*, and their servants, should have right of free passage, and should be at liberty to place a bridge over the Liesbeek River, Cloete however reserving to himself, *his heirs or successors* to "Rustenberg," to use the road and bridge with horses or pleasure carriages to and from the estate "Rustenberg;" and it was also agreed that a duplicate of the deed should be registered and annexed to the title-deeds of "Rygersdal" and "Rustenberg."

The defendant, after pleading the general issue, pleaded further that at the time of execution of the agreement of May 16, "Rustenberg" was an undivided estate, comprising a dwelling-house and undivided grounds, and the said P. L. Cloete was the owner; that afterwards, on his death, D. J. Cloete became owner, and subsequently became insolvent, and the estate was by the trustee and creditors divided into 25 lots, which on February 11, 1850, were sold separately to different persons, of which plaintiff was one; that the lot purchased by plaintiff does not contain the dwelling-house of or belonging to "Rustenberg" or any part of it, or any dwelling-house at all, but is still a mere piece of waste land; that the plaintiff has never dwelt upon it, but lives on the other side of the Liesbeek River at "Belmont," and that his horses and carriages are there, and that he (defendant) admits he is the proprietor of that part of "Rygersdal" upon which the fir avenue mentioned is, and that he has refused to permit the plaintiff to pass through the said avenue as he submits he has a right to do, seeing that, according to the true construction of the agreement, the plaintiff is not a successor of P. L. Cloete to the estate "Rustenberg," nor entitled to claim the benefit of the servitude stipulated for by P. L. Cloete, for himself, his heirs or successors, which servitude can be claimed (if at all) only by the person who occupies the original dwelling-house of the estate, or resides on any portion of the estate.

The replication was general.

It was admitted between the parties that plaintiff is the proprietor of Lot 18 of "Rustenberg" and defendant proprietor of that part of "Rygersdal" upon which the fir avenue mentioned is situate.

That "Rustenberg" was subsequently to the contract

dated May 16, 1832, divided into 26 separate lots or subdivisions.

That the original homestead of "Rygersdal" is the house now occupied by the Rev. Fry and is known as "Charlie's Hope."

That there was not and still is not any house or building whatever on Lot 18.

That plaintiff resides upon the place "Belmont," which is separated from Lot 18 by the river "Liesbeek" and adjoins the fir avenue.

That the defendant has obstructed the road through the fir avenue.

That the bridge referred to in the contract of May 16, 1832, crosses the Liesbeek River.

Watermeyer for the plaintiff.

The claim of plaintiff is under the terms of the agreement as one of the "heirs and successors" to Cloete: the defendant's contention appeared to be twofold—first, that the servitude falls to the ground by reason of the subdivision of the estate: second, that if any one could claim it, it must be the proprietor of the whole estate: and there was also a third ground that the servitude could only be claimed by one who lived on the estate. As to the first, praedial servitudes are indivisible in their nature and the servitude must be entire; but if there be a division of such a servitude each proprietor must have the servitude *in solidum*, for each proprietor is *prædium dominans*: if the estate passed to several heirs, the servitude would belong to each *in solidum*, the right cannot be affected by the presence or absence of a house (see *Digest*, 8, 1, 17); there is no distinction between general and particular successors as purchasers: *Voet*, 8, 1, 6. As to the second, take the case of there being six heirs, one only occupying the homestead, each would have the servitude *in solidum*. If Cloete had built another house on the Liesbeek River the right could not have been lost. Servitudes are inherent in property, wherever the party possessing them may reside. The right that Cloete preserved for himself was not a personal servitude, but it must be a real one.

Porter, A.G., for the defendant. The general doctrine is only attempted to be enforced by plaintiff: but this is not a

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servitude by description but by deed, and must be looked at as a whole, as the parties contracting would have done: the proprietor of the whole estate was only contemplated, any destruction of sole ownership would have released from agreement. It is not a pure real servitude on which the plaintiff rests his claim, but he would fail if it were a mixed servitude, because it could not descend to his heir: *Voet* 7, 4, 1. A praedial servitude may be granted to a man and his heirs; the construction of the instrument is for the Court: *Mackeldy Civil Law*, p. 323. Suppose the right of pasturage had been reserved, could it be enjoyed by numbers? The difference in language shewn in reserving the Rygersdal right to "future proprietors and occupiers," and in the case of Rustenberg "to the heirs and successors," shews the different intentions of the contending parties. As to the meaning of the term "successors," particular successors under the agreement must be taken as the stipulation.

[MUSGRAVE, J.—If Cloete had leased in his lifetime the party taking the place would be deemed a successor.]

The words imply family accommodation in connection with residence. Suppose the plaintiff hired out this piece of property, would the lessee be a successor and the plaintiff too? It is clear that only one ownership is contemplated.

Watermeyer in reply. The only question to be considered is the construction of the agreement as part of the title deeds of the parties. As to the right to the entire servitude, see *Digest* 8, 3, 23; and *Hüber Prælect.* 8, 4, 4; the argument for the defence comes to this, that there is no servitude; inconvenience cannot take away a right, the defendant wishes to change the intended purpose.

[MUSGRAVE, J., refers to *Dig.* 8, 3, 23, 25; and *Burge*, vol. iii. p. 444.]

Cur. adv. vult.

Posteà (Feb. 21),—

THE COURT gave judgment for plaintiff with costs.

[Plaintiff's Attorneys, J. & H. REID.
Defendant's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

STEYTLER, TRUSTEE OF VAN DER RIET, *vs.* BERGH.

Action for rescission of agreement made in error.—Agreement without consideration.—Guarantee by trustee.

The plaintiff was trustee in an insolvent estate and also acted as auctioneer in selling certain landed property in the estate: the defendant was a creditor secured by second mortgage over this property: the plaintiff at the sale agreed with defendant that if defendant would bid a certain amount for the property and pay over in cash the amount of the first mortgage, his claim in the estate should be set off against the rest of the purchase price and the balance due to him be repaid: in satisfaction of this balance a share in a company was subsequently accepted by defendant: transfer of the property was passed, and in the transfer deed it was stated that the whole amount of the purchase price had been paid: subsequently it was discovered that there was a preferent claim in the form of a tacit hypothec over the estate, and the plaintiff offered to defendant to cancel the above agreement and transfer repaying the price paid by defendant and all expenses of re-transfer, &c.; the defendant refused: taking account of the hypothec, defendant would not have been entitled to any dividend in the estate; the liquidation and distribution account had been confirmed: the plaintiff now sued as trustee for the payment of the balance of the purchase price of the house, deducting the amount of defendant's mortgage, and also for the value of the share: Held, *that plaintiff could not recover.*

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This was an action to enforce a certain contract of purchase and sale.

The declaration set forth that on November 6, 1845, the plaintiff in his capacity as trustee in the estate of Van der Riet sold to the defendant a house and premises in Bree Street for £875, and on April 23, 1846 also sold and delivered to him one share in the S. A. Bank for £6 3 10*s.*: that he has given transfer of the house: that the defendant has paid him the amount of £555 11*s.* 4*d.* in part payment, and that the balance is still due, together with the interest from the dates of sale, less the interest on the amounts already paid.

The defendant pleaded the general issue, and specially that

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on Nov. 6, 1845, he was a creditor in the estate of Van der Riet to the amount of £500 with interest, secured by a second mortgage upon the house in Bree Street, dated October 10, 1844; the first mortgage being one of £400 held by the South African Association; that at the date of the said sale which took place by public auction, the plaintiff being auctioneer, it was agreed between plaintiff and defendant that if defendant should bid £875 or any higher amount for the house, the plaintiff in his capacity as trustee would accept in part payment the claim which defendant had on the estate, namely the £500, the remainder of the purchase money to be paid in cash, when required by the plaintiff, and that under this agreement he purchased the house. That on November 18, 1845, the defendant at plaintiff's request paid him the amount of £400, being more than the amount due under the agreement, in order to enable the plaintiff to settle as trustee with the first mortgagees, under the understanding that the surplus amount paid by defendant to plaintiff should after such settlement be returned. That thereupon on the same date the plaintiff gave a free and unconditional transfer to defendant of the house, in which he acknowledged that the full amount of the purchase money, £875, had been paid by defendant, as by copy of the transfer annexed; that on April 23, 1846, the defendant having been informed by the plaintiff that about £80 was owing to him out of the £400 afore mentioned agreed to accept the said share in the South African Bank valued at £63 10*s.* in satisfaction of the balance, whereupon the share was duly transferred to him, and the defendant prayed for costs against plaintiff in his private capacity. The replication joined issue on the pleas, and further stated that the agreement in the plea referred to was made through ignorance and mistake on the plaintiff's part, and cannot be enforced in equity, seeing that at the time of the sale and purchase of the premises and of making the said agreement, the plaintiff was only aware of one mortgage prior and preferent to that of defendant, namely, that of the South African Association: that there existed at the time of making the agreement a tacit hypothec over the premises prior to the defendant's conventional mortgage in favour of the executors of J. D. Karnspeck for securing payment of £6473 9*s.* 3*d.* less part payments on account: that unless

defendant had become the purchaser of the premises he would not in fact have received any part of his mortgage debt: that the plaintiff has frequently represented to the defendant that it would be inequitable for him to take advantage of this agreement, and has offered to him to cancel the sale, and take back the premises and repay him the purchase money, and all money laid out in improving, &c. the place; and to pay all costs in connection with retransfer, which offer the defendant has always refused, and which the plaintiff now renews.

The defendant joined issue.

The deed of transfer from plaintiff to defendant dated November 18, 1845, was put in. The plaintiff admitted that the facts with regard to the delivery of the Bank share were as stated in the plea.

The liquidation account in Van der Riet's estate was filed with the Master, March 15, 1847. An affidavit of R. A. Zeederberg, dated September 2, 1848, objecting to the liquidation account on account of distribution of the assets without reference to the tacit hypothec, was also put in. This claim was admitted by the defendant: the account was confirmed on February 15, 1853. Allowing for the hypothec, defendant would have got no dividend on his bond.

For the plaintiff:

E. A. Buyskes stated: I made out the proof of debt by Karnspeck's executors on the estate of Van der Riet; there was a balance of £1303 exclusive of interest £82 odd: I spoke to defendant as to this account during the time it was lying for creditors' inspection, and said that he was a great loser in the estate by his bond: he said he could not be: I advised him to go and look at it: this was between 1847 and 1849.

For the defendant:

O. M. Bergh stated: I am nephew of defendant. I was present at the sale of the premises in Bree Street: the plaintiff was auctioneer. I heard a conversation between plaintiff and defendant previous to any bidding. Plaintiff said to defendant, "If you will bid 35,000 guilders I will guarantee you against any loss you may have on your bond." Defendant said to plaintiff, "You mean to say that you will take my bond of £500 in payment of the purchase amount of the

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house;" to which plaintiff replied, "Yes, certainly." There was no other bid but defendant's, which was 35,000 guilders, and the place was knocked down to him.

Cross-examined: I heard prior to the sale of the tacit hypothec from Mr. Zeederberg, who talked much of it in town. I never spoke to defendant on it, or he with me; nor did the plaintiff speak of it to the defendant in my presence, nor to me about it. I do not know of my own knowledge that my uncle was aware at all before the sale of the tacit hypothec; it was not referred to on the day of sale.

The following receipt was put in by the plaintiff:—

"£63 10s.

"Received from the Trustee in the Insolvent Estate of R. J. Van der Riet the sum of £63 10s. in payment of my claim against the said estate, which amount or any part thereof I promise to repay if not awarded in the confirmed liquidation account.

"April, 23, 1846.
"(Signed) A. V. BERGH."

On this document was endorsed

"The sum of £63 10s., mentioned on the other side, is the amount received by Mr. A. V. Bergh with a share in the South African Bank in satisfaction of what I had to return to him on the sum of £400 which was handed to me by him on November 18, 1845, in payment of the purchase amount of the house in the estate of R. J. Van der Riet.

"(Signed) J. G. STEYTLER."

Porter, A.G., for the plaintiff.

The question is whether the trustee is to lose £500, and the defendant as a purchaser is to gain it. The trustee is the mere officer of the law, and as such should not suffer this loss. In this case the mortgagee was settled with, presuming upon funds. The defendant was a mortgagee for £500, thus shewing that he considered the property worth at least £900. If the plaintiff acted either as trustee or auctioneer in either case, if he made this guarantee, he had no consideration for the contract. If defendant had not bid, there would probably have been no sale.

Delivery is often upon anticipation: see *Chitty's Equity Index* (3rd ed.), vol. iv., "Vendor & Purchaser," "Lien," § 12; *Croley* vs. *Callaghan* (5 Ir. Eq. R. 25), p. 2997. There is now no hypothec upon the property, for no mortgage can subsist where there has been transfer by the trustee; so

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that there is no longer any tacit hypothec against the estate. On a sale of a debt there is no implied warranty, and the principle is the same, though this is a case of cession, see *Burge*, vol. iii., p. 559. It is evident that the £1300 which might be due to Karnspeck's estate was lost sight of at the time of sale. What interest had the plaintiff to guarantee? As to legal hypothec passing *cum onere*, see *Voet* 20, 1, 14.

Watermeyer for defendant.

The estate can have no claim upon the defendant, for it has been paid; distribution of the £875 has been made, and the distribution account has been confirmed: upon plaintiff's own proof everything has been settled with it. It must be presumed that the tacit mortgage was well known; the trustee was the best person to know of it. The plaintiff evidently thought defendant's bond so good that he would have bought it; otherwise the defendant would not have gone beyond £500. The tacit hypothec was found valid in 1848, but yet there was no claim till 1853, on defendant.

Cur. adv. vult.

Posteà (August 22).

THE COURT gave judgment for defendant, with costs.

[Plaintiff's Attorneys, REDELINGHUYS & WESSELS.
Defendant's Attorneys, J. & H. REID.]

HOFMEYR *vs.* JURGENS.

Provisional sentence.—Service on agent.—Sheriff's return.

Provisional sentence refused where the sheriff's return stated that the summons had been served upon the agent of defendant, qualified by written authority (not produced), and that the agent had accepted the service.

1854.
July 12.

Hofmeyr *vs.* Jurgens.

Provisional sentence was prayed upon a promissory note for £40, against F. R. Jurgens. The sheriff's return was as follows:—

1854. July 12. — Hofmeyr *vs.* Jurgens.

"On this 30th June, 1854, I have duly served the annexed summons upon Mr. J. J. Jurgens as the qualified agent for the above defendant, F. R. Jurgens, as *per* written authority in the sheriff's office, and have delivered to him a copy thereof, and of the promissory note, and received for answer 'it is good.'"

Hofmeyr, for the plaintiff, cited Rule of Court 13,* and Ord. 37, 1828, and contended that the practice of edictal citation, and the rule as to attachment *ad fundandam jurisdictionem*, did not apply in the present case, which was one of simple debt.

THE COURT refused provisional sentence, as there was no proof as to the authority, even if it were valid, but extended the time for due service on fresh notice; new summons to be issued.

[Plaintiff's Attorney, J. H. HOFMEYR.]

HARPER *vs.* SOUTHEY.

Provisional sentence.—Service on agent.

Provisional sentence refused where the sheriff's return stated that the summons had been served upon defendant's agent, who was empowered to receive service for him in his absence; but the return day was extended.

1854. July 12. — Harper *vs.* Southey.

Provisional sentence was prayed upon promissory notes—the sheriff's return being as follows:—

"On this 18th May, 1854, I have duly served the annexed summons and copies of the promissory notes upon the defendant, William Southey, by leaving said copies with his agent, S. J. Outel, who has been empowered by the defendant to receive service for him in his absence."

THE COURT considered the service insufficient, and refused provisional sentence, but extended the time for due service upon fresh notice.

[Plaintiff's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

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* Rule 217 has now replaced this.

KNOBLE *vs.* MURRAY.

Liability of Mandatory.—Negligence.—Registered Letter.

The defendant, a cattle-dealer. agreed for no consideration to collect a sum of money for the plaintiff, who resided at a distance. After collection, he enclosed the amount in notes, in a letter to his brother, who lived in the same town as the plaintiff, transmitting in the letter £30 of his own; the letter was registered, but was lost in the post; no evidence was given of its contents, but it was proved that defendant was in the habit of transmitting sums of money to his brother to pay his own debts. Held, *that defendant was liable to make good the loss to plaintiff.*

1854. Aug. 22. — Knoble *vs.* Murray.

This action was removed from Circuit after evidence taken, and was to recover the sum of £115, money collected by defendant for the plaintiff, and forwarded in a letter to defendant's brother, which letter it was alleged was lost in the post after having been registered. The declaration stated that between October 10, 1847, and September 20, 1849, and at Cradock, the defendant, J. F. Murray, as agent or mandatory of plaintiff, A. Knoble (residing at Colesberg), and by his authority received on account and to the use of the plaintiff from one C. Scanlen the sum of £115, being a balance due by the said Scanlen to the plaintiff on a certain promissory note: that although the defendant has received this sum for the plaintiff, he has refused and neglected to deliver it.

The defendant denied these allegations, except in so far as he admitted having received the sum of £115, but said he had transmitted the amount to the plaintiff by means of the Post Office, Cradock, where it was lost; that the defendant is not liable for this loss, because in November, 1847, the plaintiff gave him a note for £214 18*s.* referred to in the declaration with a request to receive the balance and transmit to plaintiff; that defendant did not agree to do this as an agent or mandatory, but as an act of private friendship without remuneration; that when he received the money he transmitted it with £35 of his own money in a letter addressed to his brother George Murray, residing at Colesberg, with instructions to him to hand the amount of £115

1854. Aug. 22.

Knoble *vs.* Murray.

to plaintiff, which letter was posted and registered in the postmaster's book at Cradock on January 28, 1848, but the letter did not reach its destination, but that on enquiry he was informed that the mailbags of the post containing the letter were lost in the Fish River.

The replication was general.

The following evidence was led for the plaintiff:—

C. Scanlen stated that he owed the plaintiff money on a promissory note; that he paid the balance due on this note, namely, £115, to one Alfred White on defendant's behalf about the middle of November, 1847, in Frontier Bank notes; he asked White whether he would take the money in cash or notes, stating that the plaintiff had previously returned notes and drafts which had been sent to pay off this debt; White said he would take notes, as defendant wished to post them next morning. The notes which had been returned by plaintiff were sent and returned by post.

For the defendant were called:—

A. White, who stated: I am a storekeeper at Cradock. Defendant requested me to obtain payment of the balance of the note, and I did so; and I paid the notes to defendant the same day. I saw defendant enclose them in a letter to his brother George Murray of Colesberg, together with £30 more in notes; the letter was sealed and directed. I cannot state what were the amounts of the notes I received from Scanlen, nor did I take the numbers, nor could I identify them in any way, and I have heard defendant say he does not know their description. I made no charge for collection of this money; it was not a business matter, and hence the transaction does not figure in my books.

R. White, father of last witness, stated that he got the letter addressed to George Murray from his son to post and register it, and that he saw it posted and registered; he did not get a receipt for it when it was posted, but he paid the registration fee.

The postmaster proved the posting and registration of the letter, and stated that by the regulations parties were entitled to a receipt if they took the trouble of writing it themselves.

George Murray, the defendant's brother, stated that in 1847–8 he resided at Colesberg, and he acted as his brother's agent in paying and receiving monies. In beginning of 1848 defendant complained that a sum of money which ought to

be to his credit had not been entered in the account; the money which defendant was in the habit of sending was for his own accounts or debts. About this time there were promissory notes of defendant's coming due, and remittances were being sent to take them up. Defendant was in the habit of buying cattle and giving promissory notes in payment, and sending remittances for the purpose of taking them up. A short time before November defendant was in Colesberg, but did not mention he was going to send money for the purpose of paying plaintiff.

S. J. Meintjes stated that he knew the defendant, who was a farmer in 1847, and did not to witness's knowledge carry on business as a money collector, but that he had on one or two occasions collected money for witness, making no charge.

It was admitted that the letter was lost in the Great Fish River, the mailbags of that post by which it was sent were lost. No copy of the letter was produced.

The receipt given by defendant to plaintiff was as follows:—

"Received from A. KNOBLE.

"A note signed by C. Scanlen in favour of Mr. J. v. d. Merwe for collection amounting to 2865 rix dollars.

(Signed) "J. F. MURRAY.

"10th October, 1847."

Porter, A.G. (with him *Ebden*), for the plaintiff. The receipt was given in the form of business, and not as a private commission. The defendant has not produced a copy of the lost letter or given any evidence as to its contents. The question to be considered is whether the defendant was duly diligent and cautious in transmission. The local law is not the same as that in England, where the principle is that gratuitous agents are responsible only for gross negligence. See *Voet*, 17, 1, 9. *Storey on Bailments*, § 173. The Court will require the exact diligence of an attentive man. See *Twentyman and another* vs. *Norden* (reported 2 Menz. p. 271), as to what was held sufficient presentment. If the lost letter had been addressed to the plaintiff then it would be at his risk, for the General Post would be plaintiff's messenger; but the negligence consists in not addressing to plaintiff and in keeping no copy of the letter: the money must be at defendant's risk. Notes

1884. Aug. 22. — Knoble vs. Murray.

should be cut in halves, and the numbers kept. See 2 *Saunders* on Pleading and Evidence, p. 636: especial diligence should be used from the nature of transactions in the Colony. The formal receipt shows the caution on the plaintiff's part.

Watermeyer, contrà. The plaintiff used the post-transit as to the notes sent to Scanlen, and therefore he cannot complain of defendant adopting his own method. The condition of defendant as a cattle dealer is to be considered with regard to his alleged duty of exercising extreme care: see *Storey on Bailments*, § 173 (*a*). *Sir William Jones on Bailments*, p. 62, and note. The plaintiff can only require defendant's equal care as of his own property. A misapplication of the money by the brother would, I admit, throw the liability on the defendant. See *Coggs* vs. *Bernard*, Sm. L. C. (p. 171, 5th ed.; p. 199, 8th ed.). A gratuitous mandate is here the real transaction.

THE COURT gave judgment for the plaintiff with costs.

[Plaintiff's Attorney, J. BARKER.
Defendant's Attorneys, BERRANGE & HOFMEYR.]

BOSMAN *vs.* RICHTER.

Will.—Codicil.—Effect of insolvency of husband on property bequeathed to wife, married in community.

A. executed a will bequeathing her property to her sister B. subject to a fidei-commissum *in favour of B.'s children: the will directed that after B.'s death "the entire inheritance shall devolve free and unencumbered in full and free property upon B.'s children," of whom plaintiff was one. Subsequently A. executed a codicil directing that "the inheritance devolving upon her niece (the plaintiff) married to C. shall be burthened with entail of* fidei-commissum *in such manner that the usufruct or interest of the said inheritance shall not be paid by the executor to any other person" than plaintiff: C. was married to plaintiff in community of property, and at the time of execution of the*

codicil was an uncertificated insolvent: he was rehabilitated, but subsequently became again insolvent. Held, *that the trustee in this latter insolvency could not attach the interest accruing to C. under the will and codicil.*

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" 24.
Bosman vs. Richter.

This case involved the construction of certain words in a codicil. The plaintiff was S. M. Bosman born Van der Spuy, the wife of A. D. Bosman, and the defendants were H. S. T. Richter, trustee in A. D. Bosman's estate, and G. Steuart the Master.

The declaration set forth that the plaintiff's aunt, M. H. Domus, executed a will on August 23, 1820, and on July 8, 1834, executed a codicil thereto, whereby she directed that the inheritance bequeathed by her to plaintiff should be burthened by *fidei-commissum*, so that the usufruct or interest of the inheritance should be paid yearly by the executor to the plaintiff, and that after the plaintiff's death the inheritance should devolve upon the plaintiff's children or their lawful descendants in equal shares; that M. H. Domus died June 24, 1839, and that at the time of making the codicil the plaintiff's husband, A. D. Bosman, was an uncertificated insolvent, having surrendered his estate on February 20, 1834, and that he obtained his certificate on May 31, 1839; that G. H. Maasdorp, the executor testamentary, departed this life, and the Board of Executors were appointed executors dative, and on April 24, 1851, paid in to the Master £573 11*s.* 4*d.* as part of the inheritance, to the usufruct or interest of which plaintiff was entitled under the will and codicil; that plaintiff has received the interest due on this sum up to June 30, 1852, but that since then she has received none, as it has been claimed by the first defendant as trustee of the insolvent estate of A. D. Bosman, her husband; that A. D. Bosman surrendered his estate a second time on August 12, 1841, and trustees were appointed but have made no claim upon this interest: that plaintiff admits she was married in community of property, and submits as matter of law that on the true construction of the will and codicil, the usufruct or interest is bequeathed to her sole and separate use, and is no part of the joint estate, nor is a right which was ever vested in defendant as trustee. That the second defendant being misled by first defendant paid to first defendant on January 5, 1853, £81 7*s.* interest

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„ 24.

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accruing between July and December, 1852, and refuses to restore this amount to her, and second defendant declines to pay any of the further interest until a judgment of the Court has been given. Wherefore the plaintiff prayed that she might be declared entitled to all the interest under the will and codicil.

The first defendant admitted the facts set out in the declaration, and said that A. D. Bosman surrendered his estate for the third time on December 15, 1851, and that defendant was elected sole trustee, and that he is entitled to receive the interest referred to for the benefit of the estate.

The second defendant, the Master, submitted to the judgment of the Court.

The plaintiff was married in community of property. The notarial will of M. H. Domus instituted as heiress her sister, J. M. Domus: the said inheritance being burthened "with the entail of *fidei-commissum* in such manner that the interest to accrue thereon shall be paid to her sister annually, the testatrix most expressly prohibiting her sister to deduct the Trebellianic portion, whilst after her death the entire inheritance shall devolve *free and unencumbered in full and free property* upon the children of the testatrix' sister procreated in lawful wedlock with P. J. Van der Spuy," of whom plaintiff was one: the children to take in equal shares, and in case of predecease of one or more of the above instituted heirs the lawful child or children or further descendants by representation of such predeceased, and these failing, the survivor, jointly for the whole.

On July 8, 1834, the testatrix executed a codicil before a notary, which stated that by virtue of the reservatory clause in her will it is her desire "that the inheritance which shall devolve out of her estate to her niece S. M. v. d. Spuy, married to A. D. Bosman, *shall be burthened with entail of* fidei-commissum *in such manner that the usufruct or interest of the said inheritance shall not be paid by the executor to any other person than to her niece S. M. v. d. Spuy annually;* the said inheritance upon the death of the said niece devolving free and unburthened in full and free property on the children of the appearer's niece or their descendants."

Porter, A.G., for the plaintiff.

The codicil is peculiarly worded, so as to prevent this property passing to the husband. Bosman became insolvent after testatrix's death, and the interest has to be paid to no other person. The marital right here is not so strong as in England, yet these words in England would be sufficient to make the property separate. See *Storey on Equity*, vol. ii. § 1381. *Bell's Cases*, bk. 4, ch. 473, 475. It is of no use for the wife to receive this property if it has to be immediately handed over to the husband. The case of *Stanton* vs. *Hall* (2 Russ. and Mylne, p. 175) would have probably been decided otherwise in this Court; at all events, it is not an authority binding upon the Court. See also *Tyler* vs. *Lake* (2 Russ. and Mylne, p. 183). The question is one for a jury—as to the intention that the property should not go to the husband's creditors. See *Newton* vs. *Read* (4 Sim. R. p. 4), judgment of LORD BROUGHAM.

Brand, C.J., for defendant, referred to *Burge*, vol. i. p. 301, 293. In England the wife has no estate; here it is different. In this Colony the wife is liable for husband's debt contracted before her marriage, to the husband's creditors. See *Voet*, 23, 2, 77.

THE COURT gave judgment for the plaintiff with costs.

[Plaintiff's Attorney, J. G. DE KORTÉ.
Trustee's Attorney, J. H. HOFMEYR.
Master's Attorneys, J. & H. REID.]

KICHERER *vs.* KICHERER.

Marriage Order in Council, § 6.—*Proof of Marriage.*

A marriage performed by a minister who stated that he belonged to the Dutch Reformed Church, but that he was ordained to the Ministry of the Christian religion as a Missionary of the London Mission Society, held to be valid, as satisfying § 6 *of the Marriage Order in Council.* [BELL, J., *dubitante.*]

This case was tried at Colesberg on October 15, 1853, before BELL, J., and was for dissolution of marriage on the ground of adultery.

1854. Aug. 24.

Kicherer vs. Kicherer.

The case was reserved for the opinion of the Supreme Court as to the validity of the proof of marriage between plaintiff and defendant. The following evidence was given to prove the marriage:—

S. N. De Kock stated:—I am a London Missionary from the London Mission Society. I have been so for four years. I was ordained to the ministry of the Christian religion. I am of the Dutch Reformed Church. I am not ordained to the Ministry of the Dutch Reformed Church. I was ordained by Mr. Smailes, Wesleyan Minister, and by J. Read, Independent Minister. I was ordained on January 4, 1849, and since then I have preached to a congregation in Colesberg, solemnized marriages, and administered sacraments. I produce the original register of marriages solemnized by me. I performed the ceremony after putting the questions required by law.

BELL, J., doubted whether the case was within the privilege of the Marriage Order in Council, as the minister had not been ordained by the Dutch Church, of which he stated himself to be a member.

THE COURT held that under the evidence the party marrying had proved himself to have officiated in a congregation to which he had been ordained, and of which he acted as the acknowledged pastor, and a previous membership of the Dutch community did not destroy the right thus acquired in the new sectarian community with whose religious services he had connected himself, and of which he had been allowed to act as minister, and held that the marriage was proved. [§ 6 of the Marriage Order in Council is as follows: "It shall be lawful for such minister . . . . to solemnize marriage between the said parties, according to such form and ceremony as shall be in use or be adopted by the persuasion to which the minister solemnizing such marriage shall belong."]

[Plaintiff's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

HARRIS *vs.* PRINCE & CO. AND NORDEN.

Insolvency.—Ord. 6, 1843, § 98, 112.—*Deviation by trustee from terms of creditors' resolution as to sale of property.—Collusion.—Waiver.—Confirmation of Account.—Joinder.*

The South African Bank was a preferent creditor of H. on a mortgage bond, but P. had guaranteed them against any deficiency on this bond, on condition of their pressing H. with a view to causing him to surrender. H. surrendered accordingly, and N. was appointed trustee. Acting on a resolution of creditors he advertised a sale of the bonded property: subsequently the conditions of sale were altered by him, at the instance of P. and for P.'s benefit, the Bank consenting thereto. H. was present at the sale, his wife held a second mortgage bond on the property, and H. bought one of the lots in her name, when put up separately, but when put up in one lot the whole property was bought by P.; there was evidence that the alteration in the conditions of sale had had a prejudicial effect on the sale: no creditors objected to the alterations at the time, the liquidation account was confirmed and the property transferred to P. The Bank received part payment of its debt, no other creditor received anything. The Bank sued P. for the balance due upon the bond, on his guarantee, but the Court absolved him from the instance on the ground that the guarantee was against public policy: the wife of H. and the concurrent creditors brought this action against P. and N. to have the sale cancelled on grounds of collusion and fraud. The Court gave judgment for defendants, but ordered P. to pay all costs.

[BELL, J., diss.]

1851.
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„ 14.
Aug. 10.
„ 17.
„ 18.
Sept. 11.

Harris *vs.* Prince & Co. & Norden.

Certain creditors allowed to intervene as co-plaintiffs, in an action brought by an insolvent's wife who held a bond over certain property in the estate, the conditions of sale of which property had been altered by the trustee after resolution of creditors, in collusion, as was alleged, with defendant, an interested party, the trustee having been joined as co-defendant.

This was an action to set aside a sale in an insolvent estate, alleged to have been made by the trustee at the

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instance of interested parties, in fraud of creditors and not in accordance with creditors' resolution.* The declaration stated that the plaintiff was Emma Harris, assisted by her husband, Ralph Harris, and the defendants were B. Norden, trustee in the estate of Ralph Harris, and Prince Collison & Co., merchants of Cape Town; that on May 11, 1850, the estate of Harris, a merchant at Mossel Bay, was surrendered, and that on June 11 Norden was appointed trustee; that at the time of surrender there was certain immovable property at Mossel Bay belonging to Harris, over which the plaintiff, married without community, held a (second) mortgage-bond for £425, for money lent and advanced by plaintiff to her husband, as appeared from the mortgage-bond which was dated April 26, 1850; that it was Norden's duty as trustee to have caused the sale to take place in accordance with a resolution of the majority of creditors in number and value as directed by Ord. 6, 1843, § 98, that at a meeting of creditors held on July 17, 1850, it was resolved that the landed property should be sold by public auction, as recommended by the trustee in his report as follows:—

"Your trustee recommends that the said landed property situated at Mossel Bay, specially mortgaged to the South African Bank before alluded to, be forthwith sold at public auction to the highest bidder on the usual conditions:" that according to the true meaning of this resolution, and for the advantage of the estate, the property ought to have been sold in the usual manner at Mossel Bay by the rise and fall: and the trustee, in accordance with the resolution, advertised in *Government Gazettes* of July 18 and 25 and August 1, 1850, that the sale would take place at Mossel Bay on August 8: that after this the defendant Norden, without any authority from creditors, and in neglect of his duty as trustee and in collusion with Prince Collison & Co., who, though not creditors, were interested in the sale, consented to change the place of sale to the Commercial Exchange, Cape Town, in order to enable Prince & Co. to purchase the property for less than the price it would have sold for if put up at Mossel Bay; both defendants knowing that it would be sold at a price far below its true value, and intending that the creditors and the insolvent should be thereby

* See *South African Bank Trustees* vs. *Prince*, 1 Searle, p. 198.

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damnified: that the sale was advertised to take place in Cape Town on November 2, 1850, and that on that day, Norden, at the request of Prince & Co. and acting in collusion with them, ordered the auctioneer to sell by the rise only instead of by the rise and fall as he was about to do: that in consequence of this collusive arrangement, Prince & Co. became the purchasers of the property for £1063 15*s.*, a price far below the real value of the property, which was £1800: that transfer was given to Prince & Co. on November 25. Wherefore the plaintiff prayed that this collusive arrangement in fraud of creditors might be set aside and declared null and void and the transfer be cancelled.

The defendant pleaded the general issue.

Application was made for leave to join certain creditors in the insolvent estate of Harris as co-plaintiffs in the action.

Brand, C.J., in support of the application, quoted *Durr's Case*, 1 Knapp, P.C. pp. 88, 93; *William Grotius en Praxis*, p. 303, bk. 2, ch. 6, No. 18; *Voet*, 5, 1, 34, & cases of *Ross & others* vs. *Wollaston* ('Observer,' Feb. 15, 1850); *Campion* vs. *Wollaston* (reported 3 Menz. p. 323); *Henley on Bankruptcy*, p. 342; in which cases no objection was taken to the plaintiffs' right of action. Before the Ordinance any creditor might bring the action, and the Ordinance does not restrict it to the trustee alone: the present application is only to join as co-plaintiffs, leaving the great question as to the creditors' right of action to the proceedings on the trial. In the present case the trustee is one of the defendants.

Porter, A.G., for defendants. The Ordinance intended that actions as to undue preferences should be confined to the trustee. The *Actio Pauliana* (*Voet*, 42, 8, 3) affords no illustration: see § 82 of Ord. 6, 1843.

[MUSGRAVE, J., referred to Ord. 64, § 6, "at the instance of any creditor."]

§§ 84, 85, 86, 88, of the present Ordinance adopt the principle of the trustee bringing the action, and shut out of view any other person: there is no *scintilla juris* in any other person: there is a marked variation in the present Ordinance from Ord. 64: the only exception is as to the refusal of the trustee. If the trustee become adverse he may be removed under § 42: the application should not be granted, if the

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defendant Prince is placed in a different situation as to the issue in the cause. The special grounds as to removal of trustee are given in § 52; it must be not merely upon *charge* of misconduct, but only upon *proof*.

Brand:—The trustee was bound to act upon the creditors' resolution. The defendant Prince is not damnified by the intervention.

MUSGRAVE & BELL, J.J., intimated their impression that the Ordinance intended to confine the right of action to the trustee, and to make necessary his previous removal and a new appointment if the cause of any suit touching the estate should render the original trustee incompetent as the plaintiff in that cause.

Cur. adv. vult.

Posteà (June 14).

THE COURT granted the application, and allowed the creditors mentioned to intervene. At the trial *Watermeyer* appeared for the plaintiff Harris. *Brand, C.J.*, for the creditors, intervening. *Porter, A.G.* (with him *Ebden*), for the defendants Prince & Co. *Brand, J. H.*, for Norden.

The following evidence was led for the plaintiffs:—

G. Hull stated: I am an attorney, and was acting for the South African Bank in 1850: the Bank held a first mortgage for £2812 on Harris's property, of which £1766 was due. The sale had been advertised at Mossel Bay. Norden applied to me as attorney of the Bank for leave to sell at Cape Town. I told him to follow Prince's instructions, as I considered him the only person interested. I do not recollect having seen Prince before that. Prince was under a verbal engagement as surety to the Bank. The sale was subsequently advertised to take place in Cape Town, and took place on the stoep of the Commercial Exchange. I was in the Exchange ten minutes or so before the sale. Prince was sitting alone at the table: he sent for me and spoke of making some alterations in the conditions, and hoped I would not throw any obstacles in the way. I immediately stopped him and said he might do as he pleased as far as the Bank was concerned. I afterwards saw Norden, and Jones was, I think, with him, and I made the same answer.

Cross-examined: I had no opinion whether there would be any deficiency on the Bank's bond: but Prince had guaranteed against any deficiency. I was not present at any conversation between Prince and Norden. I know they had conversed together. I was no party to any collusion, nor was I aware of any. Prince had become surety at his own instance: there was a preferent bond of Hiddingh's on the estate.

R. D. Jones: I am an auctioneer, and sold the property on November 2nd, 1850. I know Norden, and before November 2nd I was instructed by him to sell in four different lots. I applied to him, because no conditions were published, to sell the lots separately by rise and fall and the final sale by the fall. I sold the four lots severally by the rise and fall and subsequently together by the rise only. I made the change by order of the trustee on the morning of the sale, before publishing the conditions.

Cross-examined: Conditions of sale are not generally published in the *Gazette*, but in the street-bills, and read at the sale. The street-bills in this case only referred to the mode of payment, the terms of sale were never published to my knowledge. Harris was present at the sale and bought as q.q. the four lots when put up separately. The Government always sells Mossel Bay Erven at the Exchange, and other persons too. I think Mossel Bay Town property could sell better in Cape Town. When lots are put up together it is better to sell by rise only, if bonus is given. In this sale bonus was given on the sale of the separate lots, but not on the entire sale. The amount bid for the separate lots was £1062 10*s*. Prince bought for £1063 16*s*. The trustees did not appear to me to be acting fraudulently in any way. The advertisement on October 24th for November 2nd hardly gave sufficient time for country speculators. The Government gave, I think, two months' notice in the Cape Division.

A. Muller: I reside at Mossel Bay and know Harris's property. I knew of its being advertised for sale and intended to purchase it, and could have gone to £2500: the sale was to have been at Mossel Bay: I was not aware of the sale at Cape Town till afterwards. I did not know then that the slip of ground by the church was not to be sold. If I had known that I should not have given so much by £200. I wanted the premises for a butchery business.

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Prince has improved them since, and I think the value now is £3000: property has risen in value.

Cross-examined: I made an affidavit on February 13th, 1854, for Harris that I would give £2500. I bought my premises from Amaury at Mossel Bay. Except this purchase, I do not remember a public sale on the spot of property at Mossel Bay within the last seven years. I will now give £2500 for the property without the slip. It is worth more now than then.

The examination of B. Norden was read on plaintiff's behalf.

B. Norden stated: I am sole trustee in Harris's estate. I advertised the sale of the property at Mossel Bay: had no conversation beforehand with Reid or Prince. After the advertisement I called at Reid's office about another matter. He said "Prince wishes the conditions of sale altered, as he is interested." The alteration was that the property be sold on the stoep of the Commercial Exchange, instead of at Mossel Bay. I said as he was not a creditor I could not pay any attention to his application. I saw the directors of the Bank were in the proof and were the parties interested. Two or three days after, Prince came to me at the Commercial rooms. He stated I had declined to Reid altering the conditions, saying he was not interested, that I was mistaken, he was the real "Simon Pure," as he was responsible to the Bank. I repeated what I had said to Reid. I said I would call at the Bank's solicitors' office, and if they would give authority I would listen to the proposal. I did so and saw Hull and told him of Prince's application. He said he would tell the directors and let me know next morning. Next morning he told me I was to obey Prince's instruction, as he was interested. I accordingly altered the advertisement and made the sale at Cape Town. Either on the morning of, or on the day before the sale, Prince made an application to me to make an alteration in the conditions of sale. My instructions to the auctioneer were to put the property up in four lots by the rise and fall, and then the four as one lot by the rise and fall. Prince objected to the latter and wished the whole to be put up by the rise only, to protect his interest, and he explained what that interest was. He said, if they were put up by the fall, the property might be called in by some other person, and then he would lose it. I said, "Call it in yourself then at the price that will protect

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you." He answered, "I might call it in at £300 or £400 higher than any person would give, and then I would have to pay auction and transfer dues on that amount." I agreed, and ordered Jones to sell accordingly. He did not mention amount, but said he was liable to the Bank. I had no interest. I was told to obey him. I have repeatedly known that parties have put their property up by the rise and fall in lots, and the whole by the rise only, even when they wished to get the most money. When the whole four lots were put up at the rise they were knocked down to Mills at a rise of 25 per cent. on the price of the whole four lots, and he gave Prince's name.

Before I filed the liquidation account Prince called at my house. He said he had made up an account which would reduce his responsibility to the Bank, as they had proved more than they were entitled to, by £678 12*s.* 1*d.* He gave me an account and memorandum and wished me to reduce the Bank's proof accordingly. I refused to do so, and said he might object to the liquidation account and fight the battle with the Bank itself. I said I knew the Bank were going to prosecute him for the deficiency. He wished me to give him back the papers, but I refused. Harris was at the sale. I did not communicate to him the alteration either as to the place of sale or the terms. He never expressed any dissent to them. He was present at the sale at my request, and I paid him his expenses under the Ordinance. He bought one of the lots when put up separately, in his wife's name. Harris before and at the sale knew that Prince had guaranteed the Bank: he told me he considered it was favourable to him. I and all the creditors with exception of plaintiffs discharged him after the sale, of his debts.

Cross-examined: Harris and Prince, previous to the latter seizing all Harris' effects, were on good terms. I was Harris's friend and adviser at the time. After the compromise he did not intend to set up stores in the premises mortgaged to the Bank. Harris and Prince have been on bad terms since the sale.

[By WYLDE, C.J.] I valued the property not from inspection but from description. I saw the Master's sworn appraiser's valuation at £1800: from experience it is impossible for me to put a valuation upon it. My opinion

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is that the sale should have been at Mossel Bay, and if I had not been ill at the time, I would not have sanctioned a sale at Cape Town. If the sale had been at Mossel Bay I have no doubt the property would have fetched more by several hundred pounds—the property sold for £1100. I bought another property about the same time from Government for £7, and have been offered £37 10s. for it, and I think I shall get more. In all my three meetings with Prince, I understood from him, as a reason for what he asked, that he was liable for what the property should not realize, so as to cover the Bank's debt: he never mentioned the amount of the Bank's debt, but he did name it as the debt proved, which I knew.

[By BELL, J. :] If the property in Mossel Bay had remained in the estate, I would not have discharged Harris. I have transferred the estate to Prince as purchaser; the transfer was made about two months after the sale; the sale was in November, 1850, and possession was given from the day of sale. The terms were, one-third cash, one-third in one year, and one-third in two years. I should say £1800 was the utmost the property would have realized.

On both occasions of alteration as to sale I had conversations with Mr. Reid; he applied for alteration as to place of sale.

This closed the plaintiff's case.

For the defence the examination *de bene esse* before BELL, J., of certain witnesses was read.

J. Focks, a mason, living at Mossel Bay :—I have known the property in question since 1846, and worked on the store before 1850 for Harris. The building was in a very bad condition, and the dwelling-house was almost as bad. I built Marsh's house in 1848–9. I think I am able to put a value on the premises sold, as they were in 1850. I should say the value in 1850, excluding Mrs. Harris's slip, was £1100 at the utmost; including that slip I would value it at £1500 in 1850. Since 1850 property has risen to double the value.

[By THE COURT :] I was never employed to value property before this occasion. I never bought any house property in Mossel Bay.

J. A. Muller: I live close to Mossel Bay, and know the property and its condition in 1850; it was not in very good condition; the house and buildings were old. I think the

value of the property in 1850 without the slip was from £1000 to £1100, and with the slip from £1400 to £1500; property has risen since in value. Prince has made considerable alterations to the property since, which must have cost £700 or £800. I think if the property had been sold in 1850 it would have brought more by a sale in Cape Town than at the Bay. Crown lands are sold in Cape Town; private farms are sold on the spot where situate. Harris bought the store and house in Cape Town.

Cross-examined: I am not aware of buildings for trade in Mossel Bay having been sold in Cape Town.

[By THE COURT:] The walls of the buildings of the property were hollow and filled up with clay and rubbish.

A. Amaury: I have known the property for twelve years; it was in the worst possible condition in 1850. I knew the value of property at Mossel Bay in 1850; without the slip the value of this property would be £800 at the utmost, and with the slip about £1600. I worked on the property for Prince, and saw the condition of the walls, which were very badly built.

[By THE COURT:] I know the value of property at Mossel Bay, because I have bought two properties there, but I have never been employed to buy or sell property for others, nor was I ever employed in the Colony to value property or houses for others, but I was so employed in France. I sold my house and land in Mossel Bay by public sale.

The defendant then called Joseph Barry, who stated: I live at Swellendam, but have a business at Mossel Bay, and know the premises in question. I am the Master's sworn appraiser. In 1850 I would have considered the value of the premises to be from £1200 to £1500 with the slip, and without it from £1200 to £1300. Large business premises would, I think, fetch more in Cape Town than if put up at Mossel Bay. I would have sold this estate in Cape Town in 1850, because there was an impression there that Mossel Bay was likely to become an important port. The price of the property in question has risen very considerably in the last four or five years. Prince has spent a great deal of money on it.

Cross-examined: I would, as trustee, have given three weeks' or a month's notice of a sale. I have known of several sales of property, public and private, at Mossel Bay,

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and I have bought two properties there myself four or five years ago. I don't think any one would have ventured to give more than £1600 for this property.

E. Landsberg: I am a merchant in Cape Town. I know the property in question. I hired the premises once in 1836, and saw them also in 1846. I was at the sale in Cape Town, and bid for a lot. I considered Prince's purchase a good one, but at the same time a fair value with reference to the intention. I saw nothing at the sale to excite my suspicion. I should say decidedly that for any mercantile purpose Cape Town would be the best place to purchase.

John Barry: I am a merchant in Cape Town. I have known the premises since 1824. I went to the sale to purchase, but when the price passed £1000 I did not think it prudent to give more. I should say Cape Town was decidedly the best place for selling. Property frequently changes hands at Mossel Bay by private sale.

The defendant put in the transfer from Harris to his wife of the strip of land, dated April 29, 1850; the transfer of the same strip from Mrs. Harris to Prince for £200, dated February 11, 1851, and the original grant to Harris dated December 31, 1849.

This closed the defence.

Watermeyer, for the plaintiffs: The simple question is what was the intent of Prince in good faith towards the estate? His intent was to benefit himself at the expense of the insolvent. Norden aided this intent. As to definition of *dolus*, see *Digest*, 4, 3, 1, § 2; in this case the creditors were to be circumvented, and Prince was to be the better by £300 or £400. A trustee is bound to use more than ordinary diligence. *Culpa lata* in civil law is equal to *dolus*. See *Sir W. Jones on Bailments* (4th ed.), p. 21; *Digest*, 11, 6, 1, and *De Verb Signif.* 50–16. The negligence may become *dolus malus* though the party had no such intent. The action taken was in direct contravention of § 98 of the Ordinance. Norden's opinion evidently was that the sale ought to have been at Mossel Bay. It may be argued that as the creditors did not come and stop the sale they waived the resolution, but how were they to know why it was done or on what terms and for what reasons? Fraud goes behind irregularity, which may be waived perhaps by *laches*. The

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plaintiff was the next preferent creditor to the Bank. If Muller had purchased for £2300, instead of there being a deficiency of £759 in the estate, there would have been a deficiency so small that Harris might have worked out his debt at least by arrangement. The surrender was forced on by Prince and the Bank, all for the purpose of getting the estate.

Porter, A.G., contrà.—In the creditor's resolution there is not a word as to where or when the place should be sold—only "forthwith." This gave the trustee a discretion as to the place of sale: the resolution merely meant that the place should be sold according to the trustee's discretion. The Bank was the one real preferent creditor at the time of surrender on their bond. Norden did not attend to Prince till he found that Prince was the real party interested. After the sale the trustee got the purchase money, made out the liquidation account, and left it for inspection.

There was no objection to the plan of distribution; the account was confirmed, and became a judgment of the Court: see § 112 of Ord. 6, 1843. Harris was at the sale, and purchased a lot. As to the creditor's resolution, if there was a deviation from it, still Prince was a stranger: he is not a creditor in the estate. There was no resolution obligatory upon Norden, still less upon Prince. Prince and Norden were merely buyer and seller; there was certainly no collusion between them. If there was a conspiracy, the Bank directors were parties; if none, the declaration must be upset, as it stands upon the *dolus malus* alone. As to the notice of the sale, there is no evidence as to Prince's knowledge of what notice was given: Muller had time to come from Mossel Bay if he wished. It must be presumed that Prince's suggestions as to change in the sale were made *bonâ fide*, unless the contrary be proved. For the plaintiff to succeed, the Court must find that the trustee intended to defraud the creditors. As to the extent of injustice in sales long past, see *Burge*, vol. ii. p. 490.

The intervening creditors are all Cape Town creditors, yet none interrupt the sale in Cape Town, or apply for an interdict, and they cannot now object. Harris was present at the sale, and bought: a general acquiescence prevailed. If the judgment be given against Prince, then the Bank will get that benefit which the Court denied in the previous

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action. There is a distinction between the recourse under a contract, and that when the contract is complete and delivery made under it.

See *Van der Keessel*, Thes. 214. If there be *dolus*, Prince will lose his improvements, and the effect will be to rescind the sale, and thus destroy a contract.

Watermeyer, in reply:—The Court has nothing to do with disastrous consequences of setting aside a sale if the transaction be really *malâ fide*. As to definition of collusion, see *Burge*, vol. ii. p. 492, 493. As to the *laches*, the light only came out last year in the action brought by the Bank. As to *dolus*, see *Storey on Bailments*, § 20. The creditors have got nothing by the distribution of the estate; there was therefore a distribution of nothing.

Cur. adv. vult.

Posteà (September 11).

THE COURT (by a majority; BELL, J., diss.) gave judgment for the defendants, but ordered Prince to pay all costs.

BELL, J., was of opinion that judgment should be for plaintiffs, with costs.

[Plaintiff's Attorneys, FAIRBRIDGE, HULL & MEINTJES.
Defendant's Attorneys, J. & H. REID.]

DOBIE *vs.* SCHICKERLING.

Right of way.—Trespass.—Prescription.—Continuous user.

The plaintiff was owner of estate W., and brought an action for trespass against defendant, owner of estate K., who pleaded that there was a right of way, which had been in use for forty years, from K. across W. to estate Z. It appeared that there had been an old road as alleged; but evidence was given that the proprietor of W., fifteen years before, had closed it up on purchasing from the then proprietor of K. certain portion of estate K., and there was no mention of any reserved right of road in

the transfer of this property. The closing up of the road was specially denied by defendant's witnesses. There was no trace of a road remaining on the estate Z., and no continuous user of the road as a public road was proved; but it was proved that at various times the road had been used as alleged by defendant. Held, *that the plaintiff was entitled to judgment.*

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This was an action of trespass.

The declaration stated that plaintiff was the owner of a house called "Woodstock," beyond and adjacent to the military lines of Cape Town, and of the lands belonging to this estate.

That defendant occupied the house and lands of the estate "Kalkbrandery," adjoining the plaintiff's estate, and that on or about 1st January, 1854, and subsequently, defendant and his servants entered upon plaintiff's lands with horses, oxen, &c., and injured the said lands, and depastured them, and that defendant asserted he was entitled to do so by virtue of a right of way which plaintiff denied, and plaintiff claimed £200 damages.

The defendant pleaded the general issue, and further that he denied the trespass, but admitted having used a road crossing the plaintiff's land and leading towards the place "Zonnebloem," which road, by prescription of upwards of forty years, had always been used, and is the only road from "Zonnebloem" to "Kalkbrandery," which road he was entitled to use, and over which he admitted having at times driven his cattle, &c., towards "Zonnebloem" for the purpose of drink.

The replication was general.

The plaintiff produced a transfer to him of his property, forty-three morgen in area, from H. Cloete, dated September 20, 1852, and a transfer of portion of "Kalkbrandery," to Cloete from Van Reenen, dated December 18, 1839. In these transfer-deeds no mention was made of any right of way.

The evidence of H. Cloete, taken on commission for the plaintiff, was as follows:—

I was formerly proprietor of "Woodstock." I built the house. I became proprietor in 1826. In 1839 I received transfer from Mr. Van Reenen, the proprietor of "Kalkbrandery," of 43 morgen of freehold, and 400 square roods of

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quit-rent land, part of the property of "Kalkbrandery" and part of "Zonnebloem." Van Reenen pointed out the landmarks and boundaries of the property to me, and my attention was drawn to a very old wagon track leading from the house at "Kalkbrandery" to "Zonnebloem," which he informed me he had made across his place for the purpose of going to and from "Zonnebloem." At this time he had for several years ceased to be lessee of "Zonnebloem:" the road did not bear marks of recent use; the grass had grown over the wagon track. During my residence at "Woodstock" in 1828 or 1829 up to 1839, I don't remember having seen a wagon or cart on that road. Immediately after purchasing the property, I had a trench cut between the residence of "Kalkbrandery" and that part purchased by me, and planted lines of fir-trees along the boundary to mark the boundary, and prevent trespass. Van Reenen was aware of what was done. Up to my leaving in 1845, I never knew of any right of road over any part of the property purchased by me claimed or exercised by any one: nor have I seen any wagon or cart going over that property except one of my own. Redelinghuys, a butcher, had been accustomed to drive his cattle through the place to Zonnebloem, but when I became proprietor I put a stop to this: and he afterwards applied to me for a right of road, but the negotiations fell through. Van Reenen never used the road even for his loose cattle. I should have stopped him if he had. He used to drive his cattle to water at a spring on the property sold to me, but after the sale he did so no longer, but cattle from "Zonnebloem" and my own used to water there.

The defendant's counsel declined to cross-examine. Further evidence was given for the plaintiff at the trial.

J. Randal stated: I was formerly in the service of Cloete at "Woodstock" in 1843, and for five years. I know Van Reenen at "Kalkbrandery." I remember a trench being dug between Cloete's and Government ground: it was six feet long, there was the appearance of a road: it was cut to stop carriages from going to "Zonnebloem" from "Kalkbrandery." When I saw people walking that way I turned them back.

Cross-examined: I can't remember when the trench was cut.

J. Lowe: I have seen defendant's cattle on plaintiff's

place; a boy was driving them. I have seen the sheep feeding. The cattle came and returned the same way to and from "Zonnebloem," unless I stopped them.

For the defence were called:—

J. Van Reenen, who stated:—I sold a piece of land to Cloete in 1839. I did not point out the land-marks to him, or go over the ground with him. There was a road crossing the land I sold, for carts, wagons, people and cattle coming from "Kalkbrandery" to "Zonnebloem": it existed when I came to "Kalkbrandery." I never saw any trench cut across that property till six or seven months ago. I continued to use that road after I sold the land to go to "Zonnebloem." The row of trees begins from the wall, leaves the road open, and then they begin on the other side. I only rode my horse that way. I never drove a cart, but I have seen Esterhuysen drive a cart that way several times. I had Esterhuysen's leave to take my horses over the road to the fountain. I did not continue to drive them after Cloete bought the land, but in the summer season. I came reside at "Kalkbrandery" in 1816; the road was then there, and it seemed to have been used. I never saw any trees planted on that road. I saw the road six or seven months ago.

Cross-examined.—I hired "Zonnebloem," and held it for four or five years.

D. Kanneberg:—I was sergeant-major of the Horse Artillery stationed at "Zonnebloem" from 1809 to 1816. I know defendant's place. I saw the defendant's place yesterday. The old road is still there; it is the same as existed when I was there: it was used by anybody wanting to go to "Zonnebloem." Wagons passed that way. I have used the road a hundred times.

A. Bester:—I am a farmer at Koeberg. I know the road, and used it through "Kalkbrandery" to "Zonnebloem." It was open to the public. I never used it except when I went to "Zonnebloem."

P. J. Redelinghuys, proprietor of "Zonnebloem" from 1837 to 1847:—I knew the road: I used it on horseback when I went to the country: I never saw a trench over it, and trees were never planted across it. I was never stopped. I often sent my wagon that way. When I came to reside, the road seemed always to have been in use.

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J. Esterhuysen:—I was proprietor of "Zonnebloem" from July, 1847, to last March. I know the road. Defendant had verbal permission to water his horses at the fountain: he had it in January last for the whole summer. All the time I was at "Zonnebloem" the road was in use: it was not a new road. The fountain is 400 or 500 yards from "Zonnebloem." I was never stopped by plaintiff till this suit was commenced. Cloete did plant trees from seed, but the road ran through these trees.

Porter, A.G., for the plaintiff:—The defendant's manner of pleading does not show what case the plaintiff has to meet: he should have stated whether his claim is for a public or private road. See 2 *Chitty Pleading*, p. 404, as to proper plea for a public road, and p. 576, for a private; see also *Alban* vs. *Bronnsall* (Yelverton's Reports, 163). There is no evidence that at present there is a public road, and it is clear that there is not. As to a public road, see *Voet*, 1, 8, 8; *Dig.* 43, 10.

The road is not placed under the administration of any Board under Ord. 8, 1843. There is clearly no road at present on "Zonnebloem," or trace of one, and if "Zonnebloem" has destroyed it, can "Kalkbrandery" claim the road for the spring? As to mere use of road, see *United States Dig.* vol. vii. 484: there is no right of road unless the use is continuous. There is no evidence of any assertion of rights.

The evidence of Cloete is uncontradicted. There has clearly been an interruption during the 33 years. Out of such an origin, prescription cannot arise. In the plea, defendant does not allege himself to be the owner of "Kalkbrandery," and therefore he must mean that the road is public. "Zonnebloem" could claim a right over "Kalkbrandery," but not *vice versâ*, as there is no vestige of a road on "Zonnebloem." The right to send horses to the dam cannot give this general right of way. See *U. S. Dig.* (by Putnam), vol. v. p. 943; *Jackson* vs. *Stacey* (Holt, p. 455); *Burge*, vol. iii. p. 413; *Grotius Introd.* bk. 2, ch. 35. Defendant in his plea never alleges he went to "Zonnebloem," only towards "Zonnebloem."

Watermeyer, contrà:—The principle of adverse possession is not applicable as to the right by prescription. Servitudes

are acquired by 33 years. I admit that defendant must prove the use of way as of the Heerengracht or St. George's Street. It is not necessary to prove continuous use. See *Grotius*, bk. 2, ch. 35. *Voet.* 8, 4, 6. *Van Leeuwen, Cens. For.* 2, 14, 5.

There is no evidence that the road is impassable. The evidence of the servitude having been created is conclusive. All that remains is, how is defendant entitled to use it? There is no question as to the road to the dam; for defendant makes no claim thereto.

Porter, in reply:— The plaintiff seeks release from all right of way. A public road has no servitude. It is clear that Cloete's impression was that in 1839 he put a stop to the use of the road and to the prescription. The transfers make no mention of conditions.

[WYLDE, C.J., referred to *R.* vs. *Lloyd*, 1 Camp. p. 260; *R.* vs. *Barr*, 1 Camp. p. 16.]

Cur. adv. vult,—

Posteà (September 11),—

THE COURT gave judgment for the plaintiff for 20*s.* and costs.

[Plaintiff's Attorneys, J. & H. REID.
Defendant's Attorney, G. J. DE KORTÉ.]

VICTOR *vs.* HAUPT.

Provisional Sentence.—Release of Surety.—Subsequent Parol Agreement.

Defendants bound themselves as sureties and co-principal debtors, renouncing all benefits, upon a document in the form of a promissory note payable one year after date. Evidence was given that the transaction was regarded, at all events by the maker and the payee, the plaintiff, as being in reality a loan, the principal to become due upon failure of payment of interest. Interest was paid from time to time for several years by the maker, who subsequently

surrendered.—Held, *that the sureties were not released, and provisional sentence must be granted against them.*

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Provisional sentence was prayed against the defendant, C. E. P. Haupt, as surety and co-principal debtor, upon the following document:—

"I, the undersigned, D. J. de Villiers, S. son, accept to pay, one year after date, to Mr. J. D. Victor or his order the sum of 4000 Cape guilders or £100 with interest from this date at 1s. 2*d.* per cent. per month, for value received in cash. (Signed) D. J. DE VILLIERS, S. son.

"Stellenbosch, November 28, 1838."

"We, the undersigned, J. J. Haupt and C. E. P. Haupt, interpose ourselves as sureties *in solidum* and joint principal debtors for the above-mentioned capital of 4000 Cape guilders or £100, with the interest due and to become due thereon, under express renunciation of the benefits, *ordinis, divisionis et excussionis*, and further under obligation according to law. "(Signed) J. J. HAUPT.

"C. E. P. HAUPT."

The case stood over from June 14 to enable the plaintiff to obtain the evidence of De Villiers, the principal debtor, now residing in Beaufort, to prove the signature of C. E. P. Haupt, which had been denied when the case first came on.

For the plaintiff the following evidence was given:—

D. J. de Villiers stated that he was insolvent, having surrendered in 1851. At the date of the document sued on, he resided at Stellenbosch, and at the suggestion of J. J. Haupt, now deceased, he called upon plaintiff, desiring him to lend him £100, and offering him, J. J. Haupt and defendant, as sureties. That thereupon plaintiff caused the document in suit to be written, and handed it to witness for the purpose of obtaining the signatures of J. J. Haupt and defendant. Witness took the document to both J. J. Haupt and defendant, separately, and they both signed in his presence, though he could not positively state whether they signed at their places near Stellenbosch or in the village itself. After they had signed, he took the document to plaintiff, who gave him £100, and told him that as long as the interest was paid he might keep the capital. The document was left with plaintiff. The interest was paid at irregular intervals till 1849.

Mr. De Korté, Attorney, stated that he had acted for defendant in various law proceedings, and that he had no doubt the signature was genuine.

Two other witnesses gave similar evidence.

For the defence three brothers of defendant were called, who swore that they did not believe that the signatures either of defendant or of J. J. Haupt, deceased, were genuine.

THE COURT were clearly of opinion that defendant's signature was proved by the evidence.

Porter, A.G., for the defendant, admitted that on this point the weight of evidence was against the defendant, but maintained that the defendant had been released as surety, although he had renounced the exceptions and had bound himself as co-principal debtor, because from De Villiers's evidence it appeared that after the engagement of suretyship had been signed, a new contract, different from the written engagement, had been entered into between the plaintiff and De Villiers, by which new engagement the plaintiff bound himself not to carry out the written engagement; but it was so changed that, if at the end of the year the interest was paid by De Villiers, plaintiff had bound himself not to sue him for the capital. By this new agreement the sureties were released; for at the end of the year, if they had gone to the plaintiff and offered to pay him the amount with interest due, the plaintiff had put it out of his power to give them the cession of action to which as sureties they were entitled. Although forbearance to sue and prolongation of time did not release the surety, a positive agreement of the nature proved, amounting to a release of the principal debtor from the written obligation, to which the defendant and his brother had become sureties, must release the sureties also, whether they were simple sureties or sureties and co-principal debtors.

Watermeyer, contrà, argued that, although it would be possible by a subsequent parol contract to discharge a written one, this was not the case here. In fact, the conversation which had been relied on as creating a new contract, was contemporaneous with, or rather prior to, the completion of the written one; for the plaintiff had not the written one, which was his security, until after he had given the money to De Villiers. In truth, the conversation was simply an explanation of what was intended by all parties in signing this document, viz., that it should be a loan to continue as long as the interest was paid. This was the

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more clear from the fact of the sureties having bound themselves for the interest "due and to become due"; "to become due" could have reference only to interest coming due in future years. The new contract being thus out of the case, there was no doubt that on the general law of the obligations of sureties, who are at the same time co-principal debtors, the defendant was liable *in solidum*.

THE COURT (WYLDE, C.J., and BELL, J.) gave provisional sentence with costs.

WYLDE, C.J., said:—I give no weight whatever to the conversation which has been relied on, as raising a new contract to which the sureties were not parties, and on the general law of the obligation of sureties, who are at the same time co-principal debtors, there is no doubt of defendant's liability.

BELL, J., concurred, and said:—A subsequent parol agreement might have released the sureties in the written obligation, if the terms of the written obligation were thereby changed. I am satisfied, however, that although the parol agreement was after the signature by the sureties, it was before the actual completion of the contract with the plaintiff. I am further satisfied, looking at the obligation of the sureties for interest "to become due," that a loan to continue at the will of the creditor, while the interest was annually paid, was intended by all the parties.

The penalty of double costs was not claimed.

[Plaintiff's Attorney, G. J. DE KORTÉ.]

BUCHANAN *vs.* SWEMMER.

Principal and Agent.—Cession by Agent.—Tortious Conversion.—Effect of Prior Judgment.

R. was B.'s agent under power of attorney authorising him to realise all B.'s assets on his (B.'s) account. R. ceded a bond made in favour of himself as B.'s agent, by a pur-

chaser of some of B.'s property, to S. the Deputy-Sheriff. The cession was made by R. as B.'s agent, and was made in order to satisfy certain writs against R. which he was unable to satisfy, partly through having made advances on B.'s behalf. In return for the cession S. satisfied the writs. S. had knowledge of all the circumstances of the case.

Held,—*That this was a tortious conversion, and that B. could recover the amount of the bond from S.*

Where a person deals with an agent with a knowledge that the transaction must be to the disadvantage of the principal, he and not the principal should suffer.

Plaintiff sued his agent, R., for an account of all monies had and received by R. on his (plaintiff's) account; and mentioned amongst other matters a certain bond which had been in R.'s possession as agent. Judgment was given by consent against R. for a certain amount and for an account to be taken. Upon R.'s surrender without having satisfied the judgment, or rendered any account, B. made a further proof on R.'s estate for the amount of this bond and other items.—Held, *that B. was not debarred from claiming the amount of the bond from S., to whom R. had wrongfully ceded it, before plaintiff obtained the judgment.*

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This action was for the recovery from defendant, the Deputy-Sheriff of the division of George, of the sum of £303 15*s.*, with interest, being amount of a bond passed October 25, 1850, by one B. Crous in favour of one G. T. Rattray, as agent and trustee of plaintiff, formerly residing in this Colony but now in Scotland, being for the balance of purchase money of certain landed estate of the plaintiff in Swellendam, sold to Crous by Rattray, which bond was ceded to defendant by Rattray on November 10, 1851. Crous paid defendant, and the bond was accordingly cancelled. The cession to defendant was challenged by plaintiff, on the ground that Rattray had no power to make the cession.

The defendant pleaded:—

1st. That he had given full value to Rattray, who had by virtue of his power of attorney from the plaintiff a power to make this cession.

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2nd. That the plaintiff had in August, 1852, brought an action against his agent, Rattray, for an account of the property and monies belonging to the plaintiff, of which this bond formed a part, and that judgment had been taken by consent for £1000 in full of all demands, and that by taking this judgment the plaintiff had lost all right, if before he had any, of disputing the validity of the cession.

3rd. That the plaintiff was not entitled to claim payment from the defendant, in the first instance at least, but was bound to sue Crous, the debtor, as having not paid to any one having authority to receive the amount.

The 3rd plea was withdrawn subsequently.

The facts proved were as follows:—

The plaintiff had resided in the Colony for some time, and had certain farms in the Swellendam division. He left the Colony in 1849, and when in Edinburgh transmitted to G. T. Rattray and C. Smyth a power of attorney appointing them "jointly or severally to recover or receive of and from all and every person or persons at the Cape of Good Hope, who may be or may become indebted to the said Duncan Buchanan, all debts, &c.," to deliver releases, acquittances, and discharges, &c., to prosecute suits, &c., "and furthermore, particularly for him the said D. Buchanan, and on his behalf, to take possession of and sell by public auction, or by private bargain, as may be deemed by them or either of them most expedient, all and singular lands and other heritages belonging to him in the said Colony, more especially all and singular that estate called Rotterdam . . . . and that other estate called Bakkely Plaats, both situate and being in the division of Swellendam, together with the houses, &c., thereon, and in general to sell, dispose of, and convert into money the whole goods and effects whatsoever pertaining and belonging to him, the said D. Buchanan, in the said Colony, nothing excepted or reserved, and for him the said D. Buchanan duly to execute by signing his name and affixing his seal to and delivering to the purchasers or purchaser of the said estates or either of them, all such deeds of conveyance or other instruments as shall be thought proper and necessary for the sufficient conveying and assuring the same, and generally to do, perform, and execute all and every such further and other lawful and reasonable acts, deeds, matters, and things whatsoever needful for the purposes hereinbefore

mentioned, as fully and effectually to all intents as the said D. Buchanan might or could do himself if personally present; ratifying and promising to ratify, allow, and confirm all and whatsoever the said G. Rattray and C. Smyth or either of them shall lawfully do or cause to be done in the premises by virtue of these presents: provided always that the said G. Rattray and C. Smyth shall and do pay over the monies which shall arise by such sale or sales as and when the same shall be made and perfected to the said D. Buchanan, his executors, administrators, and assigns, to and for his sole and proper use and benefit, or as he or they shall otherwise direct or appoint." This power was dated February 11, 1850, and transmitted to the Cape. When it arrived Smyth had died, and Rattray alone acted under it as plaintiff's agent. He proceeded to the sale of the property mentioned in the power, and Crous became the purchaser of "Rotterdam." The greater part of the purchase money having been settled by other means, Crous, on October 25, 1850, passed a mortgage bond for the balance, in which he "acknowledged to be really and lawfully indebted to and on behalf of G. Rattray, as agent and trustee of Captain D. Buchanan of Edinburgh, in the sum of £303 15*s*., being the residue of the purchase money, &c., which aforesaid sum he promised and undertook to pay or cause to be paid unto the said G. T. Rattray, as agent and trustee of Captain D. Buchanan, his order, heirs, administrators, or assigns, with the interest thereon, payable yearly at the rate of 6 per cent per annum, reckoned from December 27th, 1849." The property purchased was hypothecated in the usual manner, and the bond payable on three months' notice. In 1851, Rattray, who had in the meantime moved from Swellendam to the division of George, fell into difficulties, and had writs against him in the hands of the defendant, as Deputy-Sheriff of that division, unsatisfied.

In August, 1851, a judgment had been obtained by one Otto against Rattray in an action of debt for £225. A writ returnable on October 1 was taken out and transmitted to the defendant as Deputy-Sheriff for the purpose of execution. The debt, interest and expenses of the writ amounted to £242. Between October 6 and November 17, 1851, there was a correspondence between the defendant and the High Sheriff regarding this writ, in which the defendant

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first sent an inventory of the property to be advertised for sale in satisfaction of the writ. He subsequently remitted £124 5s. as having been paid by Rattray on account of the writ, and interposed on behalf of Rattray, desiring that the sale of the property should not be advertised, as money was very scarce, and stating that Rattray himself would be in Cape Town some short time after to pay the writ. At the same time he desired, on behalf of Rattray, to know whether the attorney in the case would take a certain bond of £250, which had been ceded to Rattray as plaintiff's agent, in which case a power to recover the bond would be sent him, and he might pay the balance of the writ from the proceeds. About the same time, Rattray sent the bond at present in suit to Otto's attorney to be kept as a pledge, desiring that proceedings should be immediately stayed. This, according to Rattray's evidence, was with defendant's knowledge. Otto's attorney refused to stay proceedings, and declined to take the bond of £250, which was transmitted by the defendant, on the ground that the power of attorney sent through the defendant by Rattray for the purpose of proceeding on the bond was not available, because "the mortgage bond had been ceded to Mr. Rattray as the agent of Captain Buchanan." This was notified by the defendant to the High Sheriff. Thereupon, in accordance with defendant's instructions, contained in a letter of October 28, the High Sheriff sent back to defendant the bond on which this action arises, as well as the bond before mentioned of £250.

The letter was as follows:—

"George Town, October 28, 1851.

"MY DEAR SIR,—As I find the attorney in the case of *Otto* vs. *Rattray* insisted in advertising the property seized, notwithstanding the bond I forwarded and the other forwarded by Mr. Rattray himself, I take the liberty of enclosing a special power in your favour to demand and receive the same from Mr. Berrangé; and on receipt of the bonds, may I then beg of you to have the goodness to deliver the bond passed by Mr. Herman with the enclosed power to Mr. J. J. Meintjes; and the one passed by Mr. Crous you will have the goodness to send to me by return of post, as the amount Mr. Rattray has still to pay on the writ is in readiness, and will be transmitted to you the moment the writ arrives. May I therefore urge on you the necessity of no delay. I shall write you more fully on this matter after the case is settled.

"(Signed) F. A. SWEMMER.

"To D. J. CLOETE, Esq."

The enclosed power was as follows:—

"I, G. T. Rattray, do hereby empower and authorize D. J. Cloete to demand and receive from J. C. Berrangé, a certain mortgage bond, amounting to £303 15s., passed by one B. C. Crous in my favour; as also a certain mortgage bond for £250, passed by one C. L. Herman in favour of B. C. Crous, and ceded to me, which latter was forwarded to the said D. J. Cloete, through the Deputy-Sheriff of George, for the purpose of being handed to the said J. C. Berrangé.

"(Signed) G. T. RATTRAY.

"George Town, October 28, 1851."

The bond of Crous for £303 15s. having in consequence of this been transmitted to the defendant by Cloete on November 3, from Cape Town, was on November 10 ceded to defendant by Rattray in the following terms:—

"As the agent of Captain Buchanan, I do hereby cede and transfer the above mortgage bond to and in favour of F. A. Swemmer, of George Town. (Signed) G. T. RATTRAY.

"George Town, November 10, 1851."

Rattray, who was now under sentence for culpable insolvency, stated in evidence, that after the above communications, when the defendant had received back the bond, he in defendant's office at George made this cession, the defendant undertaking to settle the balance of the writ against him, amounting to £126 15s.; that afterwards, within a month, he believed, after the date of the cession, the defendant paid or settled in account with him the balance of the bond thus ceded. The defendant paid for him a writ in the case of *Hudson* vs. *Rattray*, and he was indebted to him in office-fees and good-fors besides. The whole amount was paid or accounted for to him by defendant. That he had informed the defendant that the difficulties into which he had got with reference to Otto's debt were partly caused by his being obliged to advance part of the money due to Otto on behalf of plaintiff. On the same date as the cession the defendant endorsed on the writ of execution:—

"The amount of the writ and expenses in the above matter, and specified in the above account, has on this day been paid to me in full by the defendant. (Signed) F. A. SWEMMER.

"Deputy-Sheriff's Office, November 10, 1851."

The bond was then called in and paid, as before stated, to Swemmer in February, March, and April, 1852. Subse-

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quently, in 1852, the plaintiff brought an action against Rattray, claiming an account of his agency, and claiming an interlocutory order for the delivering up of this and other mortgage bonds and cash, acknowledged by Rattray, in account transmitted to plaintiff, to be in his possession. In August, 1852, a judgment by consent was taken against Rattray for £1000, for an account to be delivered within a certain period, and for the payment by instalments of the balance which might still be found due. Execution was to be stayed if certain sureties were given for the due payment of the judgment. The sureties were not given, the judgment was not carried out, and no further account furnished by Rattray; and some time subsequently Rattray surrendered his estate as insolvent. The plaintiff proved on the insolvent estate for £1000 under the judgment, and further proved the sum of £800, which, on making up the account, he claimed to be due to him by Rattray.

Watermeyer, for plaintiff:—The defendant appears to have acted all through as agent and friend of Rattray; this is shewn by the letters; no power to an agent could sanction any cession except for the interest of the principal. The defendant knew enough to oblige him to make inquiry as to Rattray's real situation as plaintiff's agent. Rattray had no authority to make cession. The power is carefully drawn: it is not a power to cede, only to sell and remit proceeds; so that Rattray had no authority to make cession. See *Storey on Agency*, § 62; see also §§ 227, 229, 437; *Hogg* vs. *Smith* (1 Taunt. p. 347).

As to the second plea, there was never any agreement that the £1000 for which judgment was given by consent should be in "full of all demands"; the judgment was provisional only, and account had to be taken; but even if the judgment was a final one, still in case of a tortious conversion proceedings may be had against both parties. It is clear, from the fact that these bonds were claimed as being in Rattray's possession at the time of action against him, that the plaintiff was in ignorance of the cession to defendant, and this being the case he could not ratify the cession or lose his claim against defendant.

Brand, C.J., for defendant:—The power of attorney is a general one; it is not merely as to immediate debts, but as

to future ones becoming due; see *Storey on Agency*, § 57, *et seq.* This bond-debt arose after the power; see *Maynard* vs. *Malan* (1 Menz. p. 299). The defendant was deceived by Rattray's representations, which amount to secrecy. If there were full knowledge of the intended misapplication, then a third party taking a principal's property from an agent could not be relieved from liability; but this full knowledge is not to be presumed. The plaintiff constituted Rattray his agent, and it was at the plaintiff's risk, not at the risk of third parties, if Rattray abused his powers and misapplied his property. Rattray had informed defendant, who had no reason for disbelieving him, that his very difficulties were caused by advances for the plaintiff. Nothing of the money went for defendant's benefit, but all went to pay Rattray's liabilities.

As to the second plea, by taking the judgment in the manner he did, the plaintiff made Rattray his debtor in a money amount, and all questions with regard to previous transactions about bonds ceased. This bond was claimed in the declaration, but yet in the judgment the bond was not to be delivered, but a money balance, in which the bond was included, to be paid. This shewed that plaintiff knew of the conversion of the bond and acknowledged it, satisfying himself with the judgment for £1000 and the further amount if any should be due. By taking this judgment all questions as to the validity or invalidity of this cession ceased. The plaintiff further proved on the estate for the £1000, and subsequently filed a second proof for £800, and in this second proof Rattray is debited with this very bond, shewing that Rattray was made his debtor, and therefore the person to whom the bond had been ceded, whoever he might be, was released.

THE COURT (WYLDE, C.J., and BELL, J.) held that this was a tortious conversion, and they had no doubt at all that there must be a judgment in favour of the plaintiff. This was a settlement with an agent under circumstances in which it was clear that no advantage at all was to be derived by the agent, as agent. And it was only as agent that he professed to cede. It appeared from the circumstances that the defendant had full knowledge of the transactions by which the principal lost all advantage from his own property.

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There was every reason why the defendant should act with circumspection, and having taken the cession as he did, he took it at his own risk. When a person deals with an agent, with a knowledge that the transaction must be to the disadvantage of the principal, he and not the principal should suffer. The defendant, knowing that by what he did Rattray did not discharge the duties of an agent, took on himself all the responsibility of the act. With respect to the second question, the Court held that the judgment against Rattray and the plaintiff's proof of debt did not affect the defendant's liability. Rattray was liable for the amount to his principal, and judgment against him did not change defendant's position.

Judgment for plaintiff for £303 15*s.*, with interest from Dec. 27, 1849, and costs.

[Plaintiff's Attorney, A. Hutchinson.
Defendant's Attorneys, Fairbridge, Hull, & Meintjes.]

Meeser *vs.* Combrinck & Albertyn.

Provisional Sentence.—Presentment.—Discharge of Endorser.—Magistrate's Jurisdiction.—Costs.

Provisional sentence refused against an endorser where the note had been presented to the maker the day after it fell due. Magistrate's Court costs only allowed where provisional sentence was granted against the maker of a note for a sum within the magistrate's jurisdiction, the endorser having been held to have been discharged.

1854. Nov. 30. Meeser vs. Combrinck & Albertyn.

Provisional sentence was claimed against N. Combrinck as maker, and C. F. Albertyn as endorser, of a promissory note for £13, made by the first defendant in favour of the second defendant and by him endorsed. The note was dated Oct. 10, and made payable one month after date.

Watermeyer, for plaintiff.

Porter, A.G., appeared for both defendants, and maintained that the endorser of the note had been discharged by the fact that presentation of the note to the maker did not take place on the day when the note fell due, Nov. 10, but on

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the day after, as appeared from the protest put in by plaintiff. Further that Combrinck, the maker, residing in Cape Town, the plaintiff was only entitled to Magistrate's Court costs against him, the Magistrate's jurisdiction amounting to £20, whatever might have been the case, had there been still any cause of action against Albertyn, the endorser, who resided at Wynberg, where the Magistrate's jurisdiction amounted only to £10. On behalf of Combrinck, tender had been made, after summons, of the amount of the note with Magistrate's Court costs.

THE COURT sustained the defence, and refused provisional sentence against Albertyn with costs, and gave provisional sentence against Combrinck with Magistrate's Court costs, no costs of protest to be chargeable.

[Plaintiff's Attorney, M. MEESER.
Defendants' Attorney, J. H. HOFMEYR.]

VAN REENEN *vs.* STANFORD.

Provisional Sentence.—Nominal holder.

Provisional sentence granted against the drawer of a bill of exchange, when the acceptor and endorser had not been summoned; and there were actions pending between them and the drawer in respect of this bill and others; and it was alleged, but denied, that plaintiff was only a nominal holder.

1854. Nov. 23.

Van Reenen *vs.* Stanford.

Provisional sentence was claimed by plaintiff as holder of the following bill of exchange.

"Cape Town, May 12, 1854.

"Six months after date please pay to my order £600 sterling, value received. (Signed) R. STANFORD.

"To MR. J. G. STEYTLER.

"Accepted
"(Signed) J. G. STEYTLER.

"Endorsed
"(Signed) R. STANFORD.
C. R. EATON."

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Watermeyer, for defendant, produced an affidavit by defendant to the effect that he believed plaintiff was merely a nominal holder; that he had never received any value for the bill, as well as another of same amount which Eaton was to discount for him; except to amount of £8 4s.; that Steytler had been defendant's general agent and in a plea to an action for an account which stood for trial on Dec. 5th next, this very bill was charged against him by Steytler: that there was an action pending against Eaton, in respect of this very bill; and it was argued for the defendant that the acceptor and endorser of the bill, though in good credit, had not been summoned, which strengthened the belief that plaintiff was not a *bonâ fide* holder for value.

Porter, A.G., for plaintiff, produced plaintiff's affidavit to the effect that he was the lawful holder of the bill, and that he discounted it for and at the request of C. R. Eaton, from whom he received it, and to whom he delivered a cheque drawn on the Union Bank for £585, the amount of the bill, less discount. It was stated with reference to the action against Steytler that there was a large reconventional claim pleaded by Steytler and that Eaton had paid Steytler as defendant's agent.

THE COURT held that they could not enter into questions between defendant and Eaton or Steytler, and gave provisional sentence as prayed.

[Plaintiff's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

BLORE & BARTMAN *vs.* OPPENHEIM.

Sale by Auction.—Tender.—Conditions of Sale.

Where defendant bought goods of plaintiffs, who were auctioneers, and the conditions of sale stated that goods should be removed within three days of sale by buyer on deposit by him of 10 *per cent. of their value, and also that they should be paid for by cash or bill to be approved of by plaintiffs; and it was further proved that defendant had previously bought goods under like conditions at plaintiffs' sale, for which payment had been made by promissory*

notes; and that he had been allowed to remove the goods in question without deposit.—Held, *that plaintiffs were entitled to ask for a payment in cash or by approved bill, as each sale was a separate transaction, and that defendant's tender of a promissory note was bad.*

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Blore & Bartman vs. Oppenheim.

The defendant was summoned by the plaintiffs, auctioneers, in an action to compel fulfilment of a contract. The declaration stated, that on August 1, 1854, the plaintiffs sold and delivered to defendant a quantity of battens and boxes of sardines at prices amounting in all to £79 8*s.* 4*d.*; that the said articles were bought by defendant subject to certain conditions of sale, by some of which it was stipulated that, if allowed to be taken away, the goods should be paid for within three days from purchase, either in cash or in bills to be approved of by the plaintiffs, and to become payable on November 1, 1854, and that, although plaintiffs allowed defendant to take away the goods purchased, he had refused within three days or at all to pay the price, either in cash or by such approved bill, although requested so to do. Wherefore the plaintiffs prayed that defendant should be condemned to pay the said sum of £79 8*s.* 4*d.*, or, in case judgment should be given before November 1, that he be condemned to deliver to the plaintiffs a bill to be approved by them for the amount to become due on November 1st.

The conditions of sale were as follows:—

1. The highest bidder to be the purchaser, and if any dispute should arise between two or more bidders, the lot in dispute to be immediately put up again and resold.

2. No person to advance less than two shillings at each bidding when above ten rix-dollars, above twenty-five rix-dollars four shillings, and so in proportion.

3. All purchasers must pay a deposit of 10 per cent., or the whole amount if required, before the lots are removed, and also declare their names and places of abode.

4. Lots which are allowed to be taken away to be at the risk of the buyer, and to be paid for at No. 11, Adderley Street within three days either in cash or bills. The bills to be approved of by the auctioneer, payable on November 1st next. No bill will be accepted for a less amount than £20 sterling.

5. The lots to be taken away, with all faults and errors of

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description, after the sale, at the purchaser's expense; and, when a deposit has been made, the remainder of the purchase-money to be paid on or before delivery.

6. Persons neglecting to call for and discharge their accounts within three days will be liable to a charge of 5 per cent. for collection and interest.

The defendant pleaded that the action did not lie, because, admitting the sale and purchase as alleged in the declaration for the sum of £79 8*s.* 4*d.*, after the goods were taken away by him, no objection being made by the plaintiffs to their being so taken away—to wit, on August 8—the plaintiffs, as they had heretofore done in all transactions and dealings which the defendant had had with them, by their clerk tendered to the defendant a promissory note dated August 1, and to fall due on November 1, for his signature, and that defendant, perceiving that the said promissory note had been altered from the usual form which had been invariably used in all dealings between the plaintiffs and defendant into a bill of exchange, apparently intended to be drawn by defendant and accepted by some third party in favour of the plaintiffs, altered the said promissory note to its original tenor and signed the same, as will more fully appear from the said note which is annexed to this plea, and which defendant prayed might be admitted as herein inserted, and rendered the same payable on November 1st to plaintiffs; but they, although the note so tendered by defendant was exactly in the same form as all promissory notes or bills, which had in similar dealings been given for like purchases in payment to them, refused to receive the said note and returned it to defendant; and, further, that on November 1, being the date at which the said note, according to the conditions of sale, would become due, defendant tendered the said amount of £79 8*s.* 4*d.* to the plaintiffs and their attorneys, but neither would receive the same without payment by defendant of the costs of this suit. And, further, that defendant has in Court ready to be paid to plaintiffs the said sum of £79 8*s.* 4*d.*, and hereby offers and tenders, as he did before, to pay the same to plaintiffs. Wherefore defendant prayed for judgment if the plaintiffs are entitled to their action, and that they should pay costs of suit. The following was the form of the document, originally a printed form of a promissory note, changed by plaintiffs into a bill

of exchange by inserting "please" instead of "I promise to," and again altered by defendant into a promissory note:—

"No. . Due November 1.

"Cape Town, August 1, 1854.

"On the first day of November, I promise to pay to Messrs. Blore and Bartman, or order, the sum of £79 8*s.* 4*d.* for value received."

"Accepted" was written across the note.

It was admitted that after the summons, which was taken out on September 19, and the declaration, which was filed on October 21, the defendant on November 1 tendered the £79 8*s.* 4*d.*, but without costs.

In order to shew the course of dealing between the parties up to the date of this transaction, the two following promissory notes were put in by the defendant, being for goods bought at auction under like conditions of sale:—

"No. 6,071. Due April 1, 1854.

"£59 1*s.* Cape Town, January 3, 1854.

"On first day of April next, I promise to pay to Messrs. Blore and Bartman or order, the sum of £59 1*s.* sterling for money received.

"Payable at South African Bank."

"No. 6,067. Due July 1, 1854.

"£60 6*s.* 10*d.* Cape Town, April 7, 1854.

"On first day of July next I promise to pay to Messrs. Blore and Bartman or order, the sum of £60 6*s.* 10*d.* for value received."

With reference to the first of these notes, the receipted bill of parcels was also produced, on the face of which was a receipt by the plaintiffs in these terms: "Settled by bill due 1st April."

Porter, A.G., for plaintiff:—The defendant is bound to adhere to the fourth section of the conditions of sale. If the plaintiffs had chosen to shew him favour on former occasions, they might withdraw that favour now. This is a distinct case from the former transactions.

Watermeyer, for defendant:—The question here is not the strict interpretation of the conditions of sale, to which even the plaintiffs do not profess to adhere, for they have thrown overboard the third altogether, but what was the understood agreement between the auctioneer and purchaser at time of sale, and at the time when the goods were taken away without objection on plaintiff's part. The answer to the

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question is clear, that it could not have been otherwise than understood that the sale and purchase were on the same terms as on previous occasions. Therefore the defendant tendered to plaintiffs the same kind of bill exactly as he had given on former occasions. What was understood by plaintiffs and defendant by "bill" is clear from the receipt "settled by bill," referring to the promissory note of £59 1*s*. Afterwards, on the date when the note would have been due, the defendant tendered in money the £79 8*s*. 4*d*., which tender he repeated. Under these circumstances the whole matter was a question of costs, which the plaintiffs should pay.

THE COURT (WYLDE, C.J., BELL, J., EBDEN, J.) unanimously held that each sale by the auctioneers was a new transaction, and that though they had on former occasions waived their right of having a bill with an additional name or cash, they had a right when they thought fit to claim a bill to be approved by them, or cash. If the defendant would give no such bill, he should have tendered cash to them. His tender of the money, after the summons, without the costs was bad, and therefore there must be judgment for the plaintiffs with costs.

[Plaintiffs' Attorneys, J. & H. REED.
Defendant's Attorney, C. J. BUISSINNÉ.]

VAN VUUREN *vs.* VAN VUUREN.

Will.—Ord. 15, 1845, § 3.—*Signing of Initials.*

A mutual will was written upon one sheet containing two leaves (four pages): the testators and one of the witnesses signed their initials on the first leaf, the other witness signed his name: all signed their names on the second leaf.—Held, *that the will was invalid on account of the parties not having signed their names upon every leaf in terms of Ord.* 15, 1845, § 3. [BELL, J., *diss.*]

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This was an action brought to have an underhand will set aside. The will was executed by the late Lucas Jantji Van

Vuuren and his surviving spouse, the defendant, on December 4, 1846, in the presence of two witnesses. The ground was that the will had not been executed according to the provisions of Ord. 15, 1845, inasmuch as the will, having been written upon more leaves than one, it should have been signed by the testator and witnesses as well upon every leaf as at the foot of the will; whereas the testator and witnesses only signed their names at the bottom of the will and wrote their initials on the first leaf; with the exception of one of the witnesses, whose signature was in full on the first leaf. There were only two leaves (that is, four pages covered with writing) to the will in question, which was all on one sheet of paper. The facts were admitted.

The case was argued in August and judgment reserved. Before judgment was given MUSGRAVE, J., died, and the case was therefore re-argued before the full Court, consisting of WYLDE, C.J., BELL, J., and EBDEN, J.

Porter, A. G. (with him *Watermeyer*), for the plaintiffs, contended that the will was not properly executed according to the Ordinance, which required the testator and witnesses to sign their names upon every leaf. See *Du Plessis* vs. *Du Plessis* * (Feb. 12, 1850), where it was decided that a will consisting of two sheets, and signed merely upon each *sheet*, was invalid, and that a "leaf" consisted of two pages.

Brand, C.J., for the defendant, contended that the Ordinance required no more than the usual signing, subscribing and attesting of a will; that it was a provision made more for the observance of the manner and form of signing and executing a will than to the effect of the signatures of the parties themselves; that a cross or mark of the testator's, made in presence of witnesses, would be sufficient to make a will valid; that the will had been sufficiently identified by what was done, which was all the law contemplated; that nowever the law of wills in regard to the manner and mode of execution may differ from the form of attestation of other documents, yet as to the effect of the signature of the parties it could make no difference; that the initials of the parties was and always remained a question of fact, which, if proved or admitted, should be sustained in law in the same manner

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as their full signatures, which might be forged as well as initials or marks. A will between parent and children should be supported, if possible—the only object of the provisions is the authentication of the will. See 4 *Burn's Ecclesiastical Law*, p. 79; 2 *Phillips on Evidence* (4th ed., pp. 485, 499); see also Stat. 1, Vict. c. 26, § 9, upon which the provisions in our Ordinance are founded; *Voet*, 44, 7, *tit. obligationibus. Schrassen's Constit.* ch. 27, art. 1.

Porter, in reply:—It is dangerous to unsettle the law. Could it be said that a "signing" had taken place, if there were initials throughout? Is there any distinction between "signing" and "signing a name?" A signature must be taken to mean the mode in which a man usually writes his name. See *Moore's Stair*, vol. ii. p. 400 n. I think that a marksman may make a will—his mark, if it be so stated on the will and leaves will be sufficient.

[BELL, J.:—Does it want the Christian names in full? It is only a matter of evidence. See *Harrison* vs. *Harrison*, 8 Ves. p. 185; *Addy* vs. *Grix*, 8 Ves. p. 504 a.]

Previous to 1844 the law was different, and it would be a question of evidence whether a will was genuine, however it might be signed; but the present Ordinance made it imperative that there must be the same signature upon every as upon any leaf. It is a question whether a will is signed at all if there are only initials: the object of the law is to prevent fraud and forgery, and the words must be construed so as to carry out the intent—the forgery of initials is more easy than that of a full name. "Sign and subscribe" must refer to name, not initials. The question arises, how much of the name must be written—but clearly at least the surname must be there—it must be the common mode of making the signature. The Ordinance has already received a strict construction in *Du Plessis* vs. *Du Plessis*.

Cur. adv. vult,—

Postea (February 1),—

THE COURT (by a majority, BELL, J., *diss.*), declared the will invalid, and that the estate must be administered as *ab intestato*, with costs out of the estate.

EBDEN, J., said he was constrained to hold that the solemnities required by law were wanting: that it was not necessary to decide the case as to a marksman's will—but that the Court were bound by the words of the Ordinance, and it was not sufficient for them to be satisfied that the will was genuine. (See *Stephen Com.*, 5th ed. vol. ii. p. 203.)

BELL, J., said:—As this case involves a question of very great importance to the Colony, and as I have not been able to concur in the view taken of it by my brethren, I have been careful to consider my judgment.

The action is at the instance of one of the heirs *ab intestato* of one of two testators, and is directed against the survivor, to have the will set aside on the ground that it has not been executed in accordance with Ord. 15, 1845, inasmuch as neither the testator nor the witnesses have signed their names upon every leaf upon which the will is written.

The will is written page-wise, on one sheet of paper of four pages, all of which are covered with writing. The first page bears the initials of three persons, and the initial letter of the Christian name and the whole of the surname of a fourth person, and the last page is signed thus—The deceased testator's name was Lucas Janse Van Vuuren: he signs L. Janse Van Vuuren; the surviving testatrix's name was Anna Elizabeth Mentz: she signs A. E. Mentz. The names of the two witnesses do not appear; but the first signs J. J. F. Roselt, and the second signs M. Taute: such being the signatures on the last page; those on the first are merely "L. J. V. V.," "A. E. M.," "J. J. F. R.," "M. Taute."

Ord. 15, 1845, § 3, declares no will executed after January 1, 1844, shall be valid "unless it *shall be signed* at the foot or end thereof by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more competent witnesses present at the same time, and such witnesses *shall attest and subscribe* the will in the presence of the person executing the same; and where the instrument shall be written upon more leaves than one the party executing the same, and also the witnesses, *shall sign their names* upon at least one side of every leaf upon which the instrument shall be written." This section of the Ordinance

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is not identical in terms with, but has evidently been framed upon, the model of the 9th section of the English Act, 1 Vict. c. 26, which declares that no will shall be valid unless it "*shall be signed* at the foot or end thereof by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, and such witnesses *shall attest* and *shall subscribe* the will in the presence of the testator, but no form of attestation shall be necessary." The Ordinance, like the Statute, does not require any particular form of attestation, but going beyond the Statute, the Ordinance provides for the case of the will being written upon more leaves than one by requiring that the party and the witnesses shall sign their names upon at least one side of every leaf.

It was admitted at the bar by the plaintiffs that the signatures at the end of the will were genuine, and that the initials on the first page were equally so; and it was assumed that all the requisites of the Ordinance had been complied with, with the exception of the single one, on which the challenge is rested, viz., that the first leaf does not bear the signature of the testators or of the witnesses; they have not, it is said, "signed their names" on that leaf.

It will have been observed that that part of the section which prescribes the mode of execution, at the end or foot of the will, says merely that it *shall be signed* by the testator and the witnesses, whereas the other part which prescribes the execution on the leaves preceding the end or foot, says that the testator and witnesses shall *sign their names*. An argument was founded on this to show that more was meant by "signing their names" than by merely "signing," that whatever liberty might be taken with the word "signing" because of any real or supposed vagueness in its meaning, none such could be used with "signing their names," as there was no ambiguity, it was said, in these words—they could only mean writing their names at full length. I confess I have not been able to go along with this argument, either upon a general view of the Ordinance, or upon the construction of the particular words upon which it is raised. In the first place, I think the use of the word "signing" merely in the first part of the section, and of the words *signing their names* in the latter part of it, was intended to

express one and the same thing, and that *their names* in the latter branch is merely an unintentional expletive. To hold that "signing their names" on each leaf intended that more should be done than was intended to be done by "signing" at the end of the will, would be to come to this odd conclusion—that the legislature was more anxious about the authentication of each leaf as a component part of the will than it was about the authentication of the entire will itself. In my opinion, what was necessary to be done under the terms "sign their names upon at least one side of every leaf" was equally necessary to be done at the foot or end of the will, under the terms "shall be signed." The question with me then is, what was necessary to be done under the terms "shall be signed" and "shall sign their names," using these expressions synonymously? And if I am right in so using them, then I think it will be impossible to avoid giving a popular interpretation to both of these expressions. Take the first "shall be signed," the expression "to sign" a document has no strict legal or technical meaning different from the popular meaning, viz., to authenticate by that which stands for or is intended to represent the name of the person who is to authenticate. If you say to the most illiterate person, "Sign this paper," if he cannot write, he will put a cross to it, and if he do not know how to do this the most experienced man of business cannot tell him to do more. If the party have learned a little writing, or if rheumatism or hard labour have cramped the nerves of his hand, and you ask him to sign a document, he will put the initial capital letters of his Christian and surname, while he will not venture upon writing the other more minute and therefore more difficult to be executed letters of these names, and he will feel satisfied that he has "signed." If the man of business doubt this, and, seeing he can write so far as to be able to make the capital letters, think it will not be sufficient without the smaller letters, and insist upon his making them, should the party say he cannot, the lawyer will be content. On the other hand, should the party make the attempt and produce a scrawl more or less legible, so again the man of business will be content—whether the scrawl be legible or illegible, he will be satisfied that the man has "signed." Such is the popular and professional practice, and the decision of the Courts had been conformably to it. In the case 4

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Schrassen's Constit. p. 180, referred to by defendants, the Dutch Statute required that the name "shall be subscribed." The expression "*subscribed*," if we are to be strict in interpretation, is a much stronger phrase than "*signed*," for "subscribe," if we attend to its derivation, is "to write under;" therefore the Statute required that "the name shall be written under;" while "*sign*," from its derivation, is to make a mark or sign only; and yet an ante-nuptial contract, authenticated only by a mark, was held to have the name "subscribed even as in other contracts, as in like manner a name is thereby intended." It being further observed that "marks in general in this part of Beluwen are valid, and received for signatures worthy of credit of those who cannot write, in the same manner as the signing of the name in the case of others, is a matter of daily occurrence. And, therefore, without any more clear expression of the meaning of the Statute in the use of the general word 'undertaking,' no sufficient reason can be found why marks should not be valid in ante-nuptial contracts even as in other contracts, in like manner a name is thereby intended."

By the English Statute of Frauds, it is enacted that all devises of lands shall be in writing and "*signed by the party*" making them; and in the English Statute of Wills, 1 Vict. c. 26, it is declared that every will to be valid "*shall be signed*" at the foot. Now in *Baker* vs. *Dening*, 8 A. & E. p. 94, a case which occurred under the Statute of Frauds, a mark by the testator was held to be sufficient signing, and moreover, which is still stronger, "*without reference to any question whether the testator could write at the time.*" And in *Wilson* vs. *Beddard* (12 Sim, p. 28), I believe a similar decision was made, though from the short reference I have to the case, I am unable to say so positively. The English Statute of Frauds says that every will shall be "*attested and subscribed*" by four witnesses. In *Harrison* vs. *Harrison* (8 Vesey, p. 185), it was held that a will *attested by the mark of a witness* was validly attested and subscribed. These authorities would seem to dispose of this case agreeably to the view I take of it, if the expression, on which the objection is raised, were confined to that in the first branch of the section of the Colonial Ordinance, *shall be signed.* But then the question arises upon the latter branch of the section, which says that the parties *shall sign their names* on each side at least of every leaf.

Little can be said upon the use of the word leaf. Though undoubtedly all that the Statute apparently wished to secure would have been accomplished by requiring the signatures to be on every sheet of paper, into however many leaves it might be folded (a sheet being as much paper as is made in one body, and a leaf being two pages, whether of a sheet folded, so as to make one or more leaves matters not).; but the Ordinance has not done so—each leaf is to be identified by the signature of the names either on the one or on the other of its pages. I need not revert further than by a passing notice to what I observed before, as to the improbability of more being required to be done for the identification of the leaves than of the body of the will itself. But, without relying on such inferential reasoning, *shall sign their name* does not by its terms say more than shall *sign*. "Shall sign" means either shall write all the letters of their names or make a sign to represent these letters, and "shall sign their names" cannot mean more or less. If it must mean, shall write the letters of the name, so must "shall sign," for a mark is as admissible or as inadmissible in the one case as in the other. The enactment is not "subscribe their names" or "*write* under" their names, as in the Dutch case, but *sign* their names. If upon the authority of that case a cross or mark will satisfy *subscribe* their names, *multo fortiori* will it satisfy *sign* their names, and initials, admittedly genuine as those here are, should do so *multo fortissimè*.

I am much confirmed in what I have said from this circumstance, that the whole tenor of the section shows that *the place* of signing, not the *mode* of signing, is the matter provided for. It is as if the Ordinance, without stopping to define what "signing" or "signing their names" meant, or specifying what would amount to a signature, had said, "Let these phrases mean what they like, the *place* of the signature must be on one page of every leaf and at the end or foot, in order that the Courts may know what are the four corners of the will and all that comes within them."

The case of *Du Plessis*, decided here in 1850, and referred to in the argument, was entirely confined to the objection as to *the place* of signing. One page of the first leaf was signed, but neither page of the second leaf; the Ordinance, therefore, had been directly disobeyed. That case, therefore, afforded no authority for the present.

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But, it is asked, if the Court may dispense with any part of the provisions of the Ordinance where is it to stop? If it may dispense with a part, why not with the whole? If initials will do on the first page why should there be more than initials anywhere else? If a mark or initials will do, why should even these be necessary, if the party will undertake to prove that witnesses were actually present, so as to satisfy all the requirements of the section? This mode of question would be unanswerable, if it were not founded on fallacy. Let it once be admitted that the writing the names at full length is a requirement of the Statute and *cadit quaestio;* but that is just the question to be decided, whereas there can be no question that signing, *in some way* is a positive requirement, and therefore an offer to prove the presence of 1000 witnesses, if there were no signing by them *in any way*, would be unavailing, because signature of *some* kind is one of the modes of authentication positively and unambiguously prescribed. In *Ellis* vs. *Smith* (1 Ves. Jun. p. 12), it was decided that a *declaration by a testator* that the will was his was *equivalent to signing.* I confess I cannot go along with that decision any more than the CHIEF JUSTICE, who is mistaken, however, in supposing that I rely upon it.

We are not *bound* by it; and as there are no precedents here, we are not, as were the able judges who decided that case, compelled *stare decisis.* That judgment did in truth *dispense* with a positive enactment which, with all deference to the judges who passed the judgment, ought to have prevailed over judicial precedents. It is not pretended that the Court can dispense with signing; but the question is—what is "signing" or "signing their names?" And if doing so may be by a mark or by initials, then the Ordinance is only satisfied, and not dispensed with.

But it is further said, if initials will do on the first page, will they not do at the foot or end? If a *mark* will do, as decided in 4 *Schrassen,* in *Baker* vs. *Dening,* and in *Harrison* vs. *Harrison,* then I don't see why *initials* should not be sufficient either at the end or on the leaves of a will. But it is further said, granting that initials will do where there is nothing else, will they do in one place when the name is signed in full elsewhere? I don't see why they may not if, as decided in *Baker* vs. *Dening,* a mark was sufficient, "without reference to the question whether the testator

could write at the time," which in fact was a decision that, admitting the testator could have written, a mark by him is sufficient, if the Court is satisfied that the mark was truly made by the testator.

In truth, the anxiety of the English Statute in the clause in which the word "sign" is used is not with a view to the authenticity of the *signature*, that is left to be accomplished through the witnesses, but with a view to the authenticity of the *quantity of matter* to be considered as the will. Indeed, the origin of that provision is to be found in a series of decisions, which had established as law that if a testator in making a will with his own hand wrote his name *in any part* of it, even on the first line, that was equivalent to signing it. The object of the English Statute was to put an end to such extraordinary doctrine by requiring the signature to be put at the foot or end; and the Colonial Ordinance has followed the English Statute, and gone a little beyond it. The provision as to signature on the leaves is to *prevent the substitution of spurious leaves*, and that with regard to signature at the foot or end is to prevent *the addition of any foreign matter after the instrument shall have left the hands of the testator;* and therefore it is that the Courts in England have not been so particular about *the mode* of the signature, and have been content if its genuineness were proved, and the provision as to the *place* of signing had been observed; and this Court seems to have taken the same view, for in the case of *Du Plessis*, which has been referred to, the will was signed only *with a mark*, yet no objection on that score was raised from the Bar, or apparently fell from the Bench. The case was confined entirely to the fact that *every leaf* was not signed, or that the *place* of signing had not been observed. But, if we must be so very strict in one construction of the words "*sign their names*" as to say that nothing short of writing them fully will do, we must go the whole length to which this rule will lead. If a mark or initials will not do, then neither will *contractions*, *misspellings*, or *vicious writing*. If genuineness and authenticity are to be disregarded—if it be unimportant whether the testator really made the instrument, that is to say, really authorised to be written as an expression of his desire, as his last will in short, all that is found written before the symbols, of whatever kind, intended to represent his name, then nothing short

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of every Christian and surname that he, the testator, has, and of every letter in each of these names, will do, although he should have five or six unspellable as well as unpronounceable names, of which we have many examples in the Colony.

If Charles Higginbotham make a will, however illiterate he may be, or however cramped his hand may be, or however unaccustomed he may be to sign his name at full length, he may not sign C. or Chas. for Charles; nor if he make a bold attempt to write Higginbotham, and produce some hieroglyphical resemblance, will that suffice. There must be every letter which the euphonious name Higginbotham contains, else he has not "signed his name," and his will is void; or should the party be a testatrix, born under the name of Brink, or Mostert, or any other name spelt pretty much as it sounds; and should she have married a man living under the blessing of a name sounding anything but like what its letters would authorize—such as De Villiers, Du Plessis, or Du Toit; should she, ignorant of the liberty with her native tongue which marriage had given her, sign her will with her married name as these names are commonly pronounced—De Filgee for De Villiers, or Du Plessi for Du Plessis, or Du Toe for Du Toit—the will would be void. It would be useless, as in the present case, to say that the signature was genuine, and that the testatrix thought she was signing properly—that would not satisfy the rule—she must sign her name at full length.

But where is the authority for all this strictness, either in the Ordinance, in sound sense, or in the fitness of things. The Ordinance does not trouble itself to specify what is, or what is not, to be considered "*signing the name.*" It makes no provision for signing at all, either one way or another. It assumes that to be necessary, and that there could not be a will without a signature of some sort. All it provides for is *where* the signature, in whatever way made, is to be placed, and merely uses the words "shall sign their names" in the course of making that provision. The Ordinance does not by a substantive separate provision say that the testator and witnesses "shall sign their names," and then by another substantive and separate provision declare *where* they shall do so. The first of these supposed provisions is entirely wanting, and all that we have is the second, the necessity of

signature *somewhere* being merely assumed. It seems to me obvious, therefore, that the *place*, and not the *mode* of signature alone, was in contemplation by the section of the Ordinance on which the objection is founded.

In these circumstances it would appear that all that can in reason be required is, that what is put to represent a signature should have been actually put by the party by whom it professes to have been put, as an attestation of his approval and authority for what goes before: and in the fitness of things, is not this enough when there must be many persons who cannot do more? But it is said, the rule may have contemplated the prevention of forgery: and are not facilities for that given by allowing a mark to be used for a name of many letters? The presence and attestation of witnesses is obviously the remedy intended to provide for this. No doubt, if the instrument were one that could be made at any time and under any prescribed circumstances, there would be some force in this argument; but considering that a will is an instrument which may have to be made at a time and under circumstances *wholly unanticipated*, the argument has no force with me to drive me to put an interpretation on the words which they do not necessarily require, and which, for the reasons I have already given and others I am about to add, would be most inconvenient and prejudicial to the community. I have had less hesitation in coming to the conclusion that this will ought to be supported, from reflecting upon the consequences of an opposite decision. In a Colony such as this, it must frequently be impossible to find a notary near enough to execute a will, or even persons competent to write and make it for the testator, instead of a notary, as allowed by the Ordinance, and at the same time to procure the necessary witnesses able to write; since there must be many of the inhabitants who are unable to write their own names. The probability, therefore, is that there are many wills executed by parties deceased, either already in operation or yet to come into operation, which have been signed by mere marks or initials. If we decide that a will executed by a mark or by initials is void, then, as to the past, we destroy all wills so executed, and as to the future, we declare that no man who cannot write can make a will, unless he has a notary or three persons who can write within his reach, at the moment when he may desire, and

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when from being *in extremis* it may be necessary for him to make it. The first of these consequences would be altogether irremediable; for though, as to the future, an Act of the Legislature may make what law the Legislature chooses, it cannot be anticipated that, as to the past, the Legislature will disturb vested interests, by declaring to be valid a class of instruments which this Court has already adjudged to be bad, and yet, unless it do so, these instruments must remain inoperative. But I offer this argument not as a reason for the judgment of the Court, whose motto must ever be *fiat justitia, ruat cœlum*, but as a consolation to myself for the difference of opinion with my brethren which I feel constrained to hold.

[Plaintiff's Attorney, J. H. HOFMEYR.
Defendant's Attorneys, REDELINGHUYS & WESSELS.]

MOSTERT *vs.* MOSTERT.

Malicious Desertion.—Restitution of Conjugal Rights.—Period of Absence.

Time of absence before commencement of proceedings is not a necessary ingredient in an action for restitution of conjugal rights, where the desertion is clearly wilful [*per* WYLDE, C. J., *and* EBDEN, J.].

What evidence is sufficient to prove malicious desertion.

Decree for restitution of conjugal rights granted where wife had been absent for six days before issue of summons. [BELL, J., *diss.*]

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Mostert *vs.* Mostert.

This was an action brought by plaintiff, the husband, against his wife for the restitution of conjugal rights. The case was heard before WYLDE, C.J., and BELL, J., but in consequence of a difference of opinion, judgment was postponed until the arrival of EBDEN, J., from Circuit.

The facts of the case were as follows:—The plaintiff was a farmer living at Paardeberg, and the defendant was the daughter of another farmer living at Hantam, which appeared to be two or three days' journey from Paardeberg. When the marriage took place, in November, 1851, the husband

remained at the bride's father's house, where the couple continued to reside till February, 1854. In that month some difference occurred between the husband and the wife's father. Whatever the quarrel was, its immediate effect was to induce the husband to remove himself and his wife from the father's farm, and to return to Paardeberg, in February, 1854. The husband and wife continued to live in their own house until May, when they went to the house of his brother Johannes, near by, on a visit. On July 5, the husband went away from the house of Johannes, along with one Van Wyk, to pay a visit to his brother Martinus; who lived within an hour of Paardeberg. The husband had hardly left Johannes' house, when his father came into the stable to Johannes and told him that Van Wyk's cart, which had been standing before Johannes' door, was being unspanned, and that the wife was preparing to go away in it. Johannes answered that he had been desired by the husband, in case she tried to go away, to stop her. What made the husband anticipate that she would do so was not disclosed, nor how the brother was to stop her in case that should become necessary. When Johannes went out of the stable he found the wife preparing to start. He said in evidence, "I told her not to go," but "she said she would do as she liked; she would go to Staines', where her father and mother were." Accordingly, she drove off, receiving no further impediment, and taking two bundles with her, which the brother swore were all her clothes, as he afterwards searched her room and found none.

By the account of Downing, another witness, when Johannes accosted the wife he asked her, "Why she was going to ride off, and where she was going?" She answered, "She was going as far as Staines'." He asked her, "Why she would not bid him good-bye?" To which she replied, "She had no objections; but she was only going to Albert Staines, and would return immediately." So soon as Johannes saw the wife drive off, he went over to his brother Martinus' house and told the husband that she had gone, and where to. The same evening the husband, Johannes, and two others went over in a cart to Staines'. It seems that some time previous, the wife's father had come from Hantam to Staines', which was within three quarters of an hour from Johannes' house. When the husband and the others reached

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Staines', they found the father of the wife at the door. The husband asked if she were there. The father said, "Yes"; and the husband said he wanted to speak with her. The husband during this conversation remained sitting in the cart. The wife came to the door, and the husband, still sitting in the cart, addressed her, and asked why she had left. She replied, "I won't live here with you; I am going to Hantam. The husband, still sitting in the cart, replied that he had come to fetch her, and asked her to come with him. The wife said, "I won't live with you here; Paardeberg won't see me any more." The husband then said to the father and Van Wyk, "Don't detain my wife; if you do, I will legally prosecute you." The father answered, "I don't detain your wife." And the wife then said, "If I were to ride on the devil I will go to Hantam." The husband then drove off. This was on July 6. On the 8th a letter was written by plaintiff's attorney, asking the defendant, who had come with her child to Cape Town, to return.

The letter was as follows:—

"Cape Town, July 8, 1854.

"MADAM,—Your husband, Mr. J. A. Mostert, has requested me to inform you that as you did, on July 6th, in his absence and without his knowledge, absent yourself from him, and still remain absent, and have, although urgently requested by him, refused to return and live together as man and wife; and as he feels grieved by such conduct and proceedings, and is willing, in order to avoid public scandal, and also out of regard for yourself and his child, whom you have taken with you, to take you to him again, and not only to forgive you your conduct, however improper, but to look on the same as never having took place; that he is ready at any time you may fix for the purpose to come and fetch you with a proper conveyance, in order thereafter to live together peaceably. He therefore requests you most earnestly not to proceed to Hantam with your father, as the distance between his residence and Hantam is very great, and he has not the means of coming for you there.

"You will oblige by favouring me with your reply hereto by the bearer. In case you should, however, be disinclined or unwilling to comply with this kind, but earnest request, he will, though reluctantly, feel compelled to have recourse to proceedings at law.

"Your obedient servant,

(signed) "G. J. DE KORTÉ,

"Attorney-at-law."

This letter was delivered, and the day after, in Cape Town, defendant saw plaintiff's attorney, and refused to comply with the request to return home. A few days after, de-

fendant proceeded to Hantam with her parents, where she remained.

Summons was issued on July 11th.

The defendant admitted the marriage, and pleaded the general issue.

Porter, A.G., for plaintiff.

Watermeyer, for defendant, was only instructed for the purpose of repelling any imputation on defendant's moral character, and to repeat that she would not return to live with her husband.

Cur. adv. vult,—

Posteà (Feb. 1, 1855),—

The majority of the COURT (WYLDE, C.J., and EBDEN, J.) gave judgment for plaintiff, defendant to return within six months; holding that where, as was proved in this case, the desertion is clearly wilful, the time of absence is not a necessary ingredient in an action for restitution of conjugal rights.

BELL, J., dissented, and delivered a long and elaborate judgment, stating the above facts, and proceeded:—The decree for adherence is preliminary to a suit for divorce, which is founded upon that decree, and in which proof of disobedience of that decree is all that is required to entitle the party to the decree of divorce. Whether, therefore, the marriage, in a case of imputed desertion, is to stand or to be put an end to, must depend on what takes place previous to the decree for adherence, and very much on what occurs at the very threshold of the suit for *that* decree. It was argued from the Bar, that all that was necessary to be ascertained, in order to sustain a suit for adherence, was proof of a settled determination on the part of one of the spouses to desert the other, and so defeat the very end of marriage. From that position I see no occasion to dissent; my difficulty is as to the character and sufficiency of the proof, or, to put it in other words, what is to be considered proof of "a determination to desert"; what is, in short, malicious desertion. The question for the Court to decide, therefore, seems to me to be, whether *duration of*

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separation for such a period of time as, of itself, independently of other circumstances, to give evidence of such alienation of feeling as renders hopeless any return to cohabitation, is not necessary in order to justify, not the making a decree for *adherence*, but the *institution of a suit for divorce*, it being acknowledged that the making of a decree for adherence and disobedience to it are all that are necessary in order to support a suit and entitle the party to a decree for divorce; so that in truth a suit for adherence is but the first step in a suit for divorce. [The learned JUDGE then proceeded to discuss Scriptural authority upon the law of marriage, with reference to Mosaic dispensation and morality in general, and continued]: It seems to me that two questions must be decided before we can give that decree. These are—1st. What is malicious desertion? 2nd. Must malicious desertion so ascertained precede a suit for adherence? 1st. I apprehend malicious desertion, or desertion proceeding *ex malitiâ*, i.e., from design, or premeditated determination, cannot, in the absence of evidence of conduct on the part of the spouse deserted, sufficient to account for such determination, be ascertained without the lapse of a certain amount of time, if indeed that can be done even where there is such evidence. If, in answer to a suit for adherence by a husband against a wife, the wife prove that the conduct of the husband, not on one occasion merely, but for a course of time, has been so cruel or brutal that no woman could be expected to submit to a repetition of it, the Court may, *without so great a length of separation*, reasonably presume that the woman will never again cohabit with the man; but even in such a case the lapse of a certain amount of time would seem to be necessary—deprivation for a time of the enjoyment of that intercourse which originally induced the couple to come together may dispose them to mutual accommodation. The husband may come to see the impropriety of his behaviour, and be disposed to promise amendment; and the wife may be disposed to forgive him and trust to his promises; and that which, in the outset, promised to be a permanent separation, may in the end prove to be only a temporary rupture. But when the wife does not meet the suit by any evidence of outrageous or unmanly conduct on the part of the husband, or by evidence of anything, of one kind or another, which would even

account for, far less justify, the separation which has taken place, and all that is presented to the Court is the bare fact of the actual departure of the wife from the house of the husband, as in this case, with her declaration to him afterwards, "I won't live with you here; Paardeberg won't see me any more,"—how is it possible for the Court to say that a desertion of this kind proceeds from that settled determined alienation of affections which precludes all hope of a return to conjugal communion? [The learned JUDGE here discussed at length the circumstances of the present case as shewing that there is no settled determination to desert the husband, and continued]: That the view I take on this subject is not opposed to the law of the Colony, but, on the contrary, is in harmony with it, may be gathered from *Voet*, 24, 2, 1: "If with inconsiderate heat and haste, of which repentance is usually the companion, a writing of divorce may have been sent, and in a short time the wife return, she does not appear to have gone away. On this account, whatever is done or said in the warmth of passion is not reckoned or considered, until by persistency it appear to be a judgment of the mind, whence it is rather a strife or coldness than a separation or parting." How can any one say that what this young woman did was not done with inconsiderate heat and haste, and that what was so done in the warmth of passion should not be reckoned or considered until by persistency it appear to be a judgment of the mind? *Voet*, 24, 2, 2: "Although great licence in the matter of divorce was allowed among the later Romans, yet this was as a necessary evil, rather tolerated than approved of, as is shewn from this, that by a law of Romulus power was taken from the woman of leaving her husband; but the man was permitted to throw off the woman for a few causes only—for instance, if she should have used poison to her children, or have substituted other children for her own, or have committed adultery," and in § 5: "But in modern times there are only two causes sufficient to break the bonds of matrimony suitably to the Divine law, viz., the adultery of either spouse, and malicious desertion"; and in § 9: "As to malicious desertion, if it shall appear that a solemn trial of desertion having been had, and the deserting spouse having been frequently cited, through contumacy refuses to return to cohabitation, then the matrimonial tie may be dissolved by public authority in the same

way as in the case of adultery, so that the innocent spouse may have an opportunity of entering into new conjugal bonds, and the offending spouse may not; *but in every event this is not to be done unless all hope of reconciliation is at an end*"; and in § 11, when discussing whether, where there is no decree, a wife should, after the lapse of several years, be allowed to repent: "For even after sentence of desertion and separation still every effort is to be tried for reconciliation, and a renewal of the marriage already publicly dissolved." It is true that in none of these passages is it distinctly laid down what it is that constitutes malicious desertion, nor what length of time should intervene between the separation and the institution of legal proceedings. Nay, an argument might very plausibly be raised upon those parts of § 11 which I have not thought it necessary to quote, to show that the husband should be early in the adoption of legal proceedings; but such an argument would misrepresent the doctrine which, as it appears to me, *Voet* intends to lay down. If §§ 1, 2, 9, 11 are taken together, they express an opinion such as I have ventured to give, at greater length, that everything must be done towards producing reconciliation before legal proceedings are adopted in order to dissolve the conjugal connection, and that anything which may have been said by the wife at parting is to be taken to have been said "in inconsiderate heat and haste," and is not to be reckoned until "by persistency" it appears to be a judgment of the mind. And so strong is the learned author against dissolution of the marriage tie for desertion, that he thinks the door for the deserting spouse's return should never be closed until the deserted spouse has, after decree, entered into a second marriage.

But it was argued, if the time between July 6 and 7 was not sufficient to show the determination, at all events the six months which have elapsed since then are so. This leads me to the 2nd question, viz., must malicious desertion, whatever it be ascertained to be, precede a suit for adherence, as preliminary to a suit for divorce on the ground of desertion? Or, to state it more fully, must the length of time of separation necessary to constitute malicious desertion have elapsed before the suit for adherence can be instituted? Or may the time which has elapsed, between the time of instituting the suit and of making the decree in it, be taken into account?

I believe it to be the ordinary rule in all actions, that they are tried according to the circumstances, as they existed at the date of bringing the action. But if this be not so, can there be a doubt that it ought to be the rule, in cases such as the present? [The learned JUDGE went on to say that efforts should be made by the parents and the husband to bring the wife to a better state of mind and induce her to return, and proceeded]: When the law was laid down broadly to justify this proceeding, it was qualified by an observation that there must not be collusion between the spouses, as that has always been held sufficient to prevent the relief asked of the Court. If the law be, as I have stated, that marriage, though not a sacrament, is not an ordinary but an extraordinary civil contract, regulated by Divine command, and put by human law beyond the control of the parties and dissoluble only for adultery or desertion, showing an enduring alienation of the affections, then the qualification of such law, by the proviso that there must not be collusion, is intelligible, the husband must not, in order to make that dissoluble which by the law is indissoluble, have procured his own dishonour by inducing or allowing his wife to become an adulteress; nor may he collude with her to produce a state of circumstances *having the appearance* of an inevitable alienation of affections from the natural working of temper and disposition, when, in fact, there was nothing on either side but an irreligious, immoral and unprincipled indifference to the conjugal oath and a desire o change.

But if the law be that marriage is an ordinary civil contract, which the parties may put an end to of their own will, whenever they become so minded, from any cause whatsoever, how can collusion have any place? If the open expression of what they wish will entitle them to get what they ask, what possible motive can they have for concealing anything, or if a difference between them shall produce an honest quarrel and an expression of a determination never to live together again, and five days' duration of that quarrel (hardly enough for the blood to cool) shall entitle them to have the marriage tie dissolved, what place can collusion have in such a case? . . . Why, the very insignificance of the quarrel should of itself suggest, without evidence to that effect, the existence of collusion against any parties who

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come to ask for a divorce on such a state of circumstances. . . . I am therefore for dismissing this action as brought untimeously, and without the previous use of those means for reconciliation and return to conjugal intercourse, which ought to have been taken advantage of before this Court was applied to; leaving the husband to act as he may be advised in regard to any other proceedings.

[Plaintiff's Attorney, G. J. DE KORTÉ.
Defendant's Attorney, J. & H. REID.]

STEYTLER *vs.* FREEMAN.

Sale by Auction.—Effect of a Bid.—Bonus.

M. made a bid on his own behalf at a public sale held by plaintiff, an auctioneer, and took £5 bonus. The conditions of sale stated that the highest bidder should be considered purchaser. Before the property was knocked down, M. agreed with defendant that the latter should take over the bid. M. gave defendant £4 of the bonus, and kept £1. The property was knocked down to M., and the auctioneer, on instructions given by M., took down the purchase as made by M., q.q. In an action to compel defendant to sign the conditions of sale the Court gave judgment for the plaintiff.

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Steytler vs. Freeman.

This was an action by an auctioneer to compel an alleged purchaser at public auction to sign the conditions of sale.

The declaration stated that plaintiff was an auctioneer, and as such sold publicly on January 23, 1855, at Cape Town, certain landed property called "Weltevreden," under conditions of sale annexed; that defendant at the said sale became by his duly authorised agent, Charles Marais, the purchaser of two lots—lot 1 in Block A, and lot 1 in Block H, for £1100; that after the lots had been knocked down to Marais, as defendant's agent, plaintiff requested defendant to sign the conditions of sale, which defendant refused to do. Wherefore the plaintiff prayed that defendant might be declared to be, by his agent, the purchaser, and be compelled to sign the conditions of sale; or that defendant might be condemned to pay the sum of £1000, with interest, from January 23, 1855; the plaintiff offering upon payment to

give defendant free and unencumbered transfer, or for further and other relief.

The conditions of sale stated that the property would be sold by the rise, and the highest bidder should be considered purchaser; and that if a higher price should be offered for all the lots in the aggregate, when put up at the seller's instance, after the sale of the individual lots, in such case the sale of the separate lots should be null and void. The usual conditions as to sureties, &c., followed.

The defendant pleaded the general issue.

For the plaintiff, the auctioneer's clerk proved the circumstances of the sale, and produced the original memorandum of biddings. Marais bid for the two lots together, with £5 bonus, and was entered as purchaser. Afterwards all the lots were put up together, but there was no advance. Marais was the highest bidder. After the sale he came up and asked that his name should be entered as *q.q.*: this was done.

Cross-examined—Marais purchased other lots that day, and took bonus. He said that all he bought was to be put to him as *q.q.*: sometimes the principals are named at plaintiff's sales, and sometimes only the *q.q.'s*.

C. Marais was called by the plaintiff.

Watermeyer, for defendant, objects, as the action is brought on his individual behalf; Ord. 14, 1846. This is a question between Marais and defendant.

Porter, A.G., contrà, quotes Lord Denman's Act, 6, 7 Vict. ch. 85, the very words of the preamble of which are quoted in the Colonial Ordinance. See 1 *Phil. on Evidence*, 10th ed. p. 54; *Paley on Principal and Agent*, ch. iii. pt. 4, § 5 (3rd ed. 1833, p. 318).

THE COURT overruled the objection.

Witness states:—I went to the sale with defendant and bid £1100 for the property. I got £5 bonus. Defendant stood at my back, clapped me on the shoulder, and asked me to follow him to the back of his garden. He asked me to give him £4: "Keep £1 yourself, and I will take the bid over, as I know you don't want the property." He made the condition that I should act as *q.q.* with the auctioneer, as he said that if he bid himself people would bid him up. Ten minutes elapsed before the lot was knocked down. I told plaintiff I was only bidding *q.q.* I went immediately. I brought

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plaintiff to defendant, and said, "Here is the purchaser." Plaintiff, said "Very well." Before I went to plaintiff, I gave the defendant the £4 and kept £1 myself.

Cross-examined—I considered the property very cheap, and therefore took the £5. When I first bid, and took the £5, it was for myself. I sometimes have bought *q.q.* at sales when buying for myself, when I may not wish to be known as purchaser.

J. H. Hofmeyr, plaintiff's attorney, stated that he took the conditions of sale to defendant on 26th, but he said he could not sign them, as he said Marais had shewn him more property than was given by the conditions of sale: that defendant shewed a paper parcel which he said was the £4 given him by Marais. Two other witnesses were called, who stated that they were at the sale and saw the property knocked down to Marais. (See Ord. 18, 1844, as to transfer-duty.)

Porter, A.G., for plaintiff, argued that bonus-taking was countenanced by public opinion, and refers to *Matthæus* as to *strykgeld*. The sale in the first instance was only provisional until the whole property had been put up.

Watermeyer, for defendant:—This action is brought to make the Court a party to an illegal transaction According to the conditions of sale, the highest bidder is considered the purchaser, that is, the man who took the bonus. He was then the principal, but afterwards he became the agent; what has the auctioneer to do with him? Whatever took place after the bidding, cannot affect the character of the bidder: as to the sale being provisional it is only so as to the vendor, not as to vendee. See *Matthæus de Auctionibus*, bk. 1, ch. x. § 13, 14, p. 78: the bidder is the purchaser unless he has either a special power or names the principal at the time of bidding. See *Digest*, 11–5–2, 3, *de aleatoribus*: this is a gambling transaction; it is the converse of a bet. *Voet* 11–5–6, 7.

Porter, in reply:—A bid can never be a contract. Marais can never sue as to a bid. When Marais sold to defendant his bidding he had no land, and so no duty could accrue. There is no proof of misrepresentation in the case.

THE COURT gave judgment for the plaintiff according to the first part of the prayer in the declaration, with costs.

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BELL, J., said:—Conditions of sale need not be signed at all to establish a sale. The meaning of the Ordinance is that duty must be paid upon actual sale in common terms and bearing. I have a doubt as to *strykgeld* or bonus; but the auctioneer did it openly and in public. The practice is impolitic and injurious to the community.

EBDEN, J., said:—It is satisfactorily proved that plaintiff sold to defendant. If what took place did so after the hammer fell, I should hold it was an illegal transaction and a fraud upon the revenue. As to the bonus, if it is an immoral practice, there should be recourse to the Legislature.

[Plaintiff's Attorney, J. H. HOFMEYR.
Defendant's Attorneys, J. & H. REID.]

ZIERVOGEL *vs.* BEKKER.

Provisional Sentence.—Proof of Presentment.

Provisional sentence granted on a promissory note payable at sight, subject to proof of presentment being given to the Registrar.

1855. April 14. Ziervogel vs. Bekker.

Provisional sentence was prayed upon several documents signed by defendant, one of which was as follows:—

"At sight I promise to pay to Mr. A. F. Ziervogel ten pounds sterling for value received."

The service was personal.

Watermeyer, for plaintiff, referred to *Meyring* vs. *Camphor* * (September 12, 1851); *Storey on Bills*, § 325; and argued

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* MEYRING *vs.* CAMPHOR.

Provisional sentence was prayed upon a promise to pay, "at sight or presentation," to plaintiff or order the sum 200rds. The service of summons was personal, and the return of Sheriff stated that plaintiff replied, "I will come and pay." There was no proof of presentation or demand except the summons.

Porter, A.G., for plaintiff, argued that the summons was a sufficient demand, and referred to *Storey on Bills*, § 325.

The defendant was in default.

THE COURT granted provisional sentence.

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that the action was of itself a sufficient demand of payment.

Defendant was in default.

THE COURT granted provisional sentence with costs, subject to proof of presentment of the bill being given to the Registrar.

[Plaintiff's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

EAGAR & OTHERS *vs.* DENYSSEN.

Provisional Sentence.—Writ of Execution.—Special and general Mortgage.—Rule of Court 36.

On provisional judgment being obtained upon a special mortgage bond containing the general clause, the plaintiff may at once take out a writ of execution against the defendant's movable property, although the specially mortgaged property was declared executable according to prayer in the summons.

1855. May 31. — Eagar & Others *vs.* Denyssen.

Provisional sentence had been granted on May 25 against Zeederberg, Eagar and others, upon a mortgage bond for £4000, passed by them jointly and severally in favour of plaintiff. The bond had become due by reason of non-payment of interest, and the property specially mortgaged was according to a prayer in the summons declared executable. The bond contained the general clause.

Application was made by defendants that the immovable property be sold before the movable.

The affidavit of defendant Eagar stated that on May 26 a writ of execution was issued by plaintiff upon the judgment against the goods and chattels of defendants, and that thereunder certain goods and chattels had been attached without the immovable property being excussed; that the property specially mortgaged was purchased for £5000.

Watermeyer, for applicants, cited Rule of Court 36; *Merula Manier van Procederen* (Van der Linden's Edition), bk. 4, tit. 93, ch. viii. n. a.; *Instructions to Court of Justice*, 3 Ch. 64 par. The principle is from *Code* 8, 14, 2. In the present

case the mortgaged property is sufficient to pay the debt; this is the important question. The special mortgage is the chief thing and the general only subsidiary.

Porter, A.G., contrà:—The bond gives the mortgagee the choice, by submitting all the mortgagor's property; it acknowledges a debt. There is a distinction between *pignus* and *hypotheca*, and the *Code* refers to *pignus* and its effect as to using *pignus* before other movable property. The land is still in the applicants' possession. The applicants must go to the extent that a plaintiff is bound to excuss a special mortgage even though he does not so pray in the summons, otherwise no one would insert the prayer in the summons that the mortgaged property be declared executable. Rule 36 is conclusive. The situation of the plaintiff would be most unfortunate, if he were forced to sell the immovable property before movable: the immovable property may take months to realise, and the movables be meanwhile wasted.

Watermeyer, in reply:—The plaintiff is precluded by the form of his summons: nothing is said therein as to the general mortgage. The property specially mortgaged will be sufficient to cover the debt. *Pignus* and *hypotheca* are the same expression—one is the genus, the other the species.

Van der Linden lays down the same principle as *Merula*.

THE COURT refused the application with costs.

BELL, J., said the authorities quoted do not apply. The case depends upon the construction of the bond and the choice therein given. Possibly other creditors may intervene and say that the special mortgage must be executed and the authorities quoted may apply to such a case; but Rule 36 governs the practice.

[Respondents' Attorneys, REDELINGHUYS & WESSEL.]

ROUX *vs.* BEZUIDENHOUT, EXECUTRIX OF GILDENHUYS.*

Title to Land.—Grant.—Diagram.—Beacons.—Evidence.

Where the grants and original diagrams annexed of two adjoining properties do not conflict, and land can be found to satisfy the terms of the grants, no evidence can be received of local boundaries and of possession according to them, but in contradiction of the terms of the grant. (*No question of prescription arising.*)

If the boundaries cannot be ascertained from the titles and diagrams, the rights of the grantees must be determined by oral evidence as to beacons and possession.

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Roux *vs.* Gildenhuys' Executrix.

This was an action for a reversal of a provisional judgment given by MUSGRAVE, J., at the Graafreinet Circuit Court in April, 1847; by which judgment one Gildenhuys, of whom the present defendant was the executrix, obtained £20 damages from Roux, the present plaintiff, for a trespass upon a certain piece of land called "Strydoms Valley": the ownership of this land was the matter in dispute. The case was heard at the Circuit Court at Beaufort, in May, 1848, and by consent of parties was referred to arbitration, which, however, fell to the ground; and further evidence was taken in 1854 at Beaufort Circuit Court, before MUSGRAVE, J., the case being replaced in the position in which it was at the time when the order for arbitration was made; it was then removed to the Supreme Court for judgment.

The summons stated that C. P. Bezuidenhout, of Loeriefontein, in Beaufort Division, in her capacity as executrix testamentary of H. J. Gildenhuys, was summoned to answer C. J. Roux, of Zoetendals Valley, in an action to obtain a decree reversing a judgment, and for the recovery of damages, in that the said H. J. Gildenhuys, on April 10, 1847, commenced proceedings in the Circuit Court for Graaferinet against the present plaintiff, claiming that he should be adjudged to remove certain movable property from a piece of ground forming part of the farm Loeriefontein, and that he should be interdicted for the future from occupying the same, and that he should pay £40 damages for his illegal occupa-

* See *Penketh* vs. *Calvert*, p. 160.

tion of the said piece of ground. That the summons was heard before MUSGRAVE, J., on April 22, 1847, when the said plaintiff did not appear, and on the evidence produced by Gildenhuys the Court gave judgment against him for £20 damages and costs, such judgment to have the effect of a provisional sentence: that the plaintiff is entitled to have this judgment reversed because he says that long before January, 1847, he had been the owner of the farm, Zoetendals Valley, adjoining the farm Loeriefontein, and had been accustomed to consider a certain piece of ground called Strydoms Valley as belonging to Zoetendals Valley, and had caused his live stock to be grazed there. That on January 22, 1847, he received a letter from the agent of Gildenhuys informing him, that having examined the diagram of Loeriefontein he found that Strydoms Valley was included in it, and claiming damages; whereupon plaintiff removed his cattle therefrom, but set about getting a competent survey of the property made. That while he was absent on this business the summons was served at his house, and hence he did not appear at the Circuit Court. That having engaged Mr. Elemans, a competent surveyor, to survey the ground, it was found that the piece of ground belonged to the farm Zoetendals Valley. That the plaintiff has been put to great costs and charges, and has sustained damages to the extent of £150, which he claims that the defendant, as being the executrix of Gildenhuys (who died February 14, 1848), may be condemned to pay him, and that the judgment may be reversed and the plaintiff replaced in his proper position. In the Supreme Court further evidence was taken by consent. Mr. Stretch, the original surveyor in 1830 and 1833 of the farms of plaintiff and defendant, the titles to which were both issued by the Government on April 15, 1841, was examined for the plaintiff, and the Surveyor-General for the defendant.

Watermeyer appeared for the plaintiff.

Porter, A.G., for the defendant.

The case was argued before WYLDE, C.J., and BELL, J. The arguments and all the important evidence will be found in the judgment of BELL, J.

THE COURT gave judgment for the plaintiff, reversing the

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judgment of 1847, with costs, on the grounds stated in the following judgment, delivered by

BELL, J.:—This case arises out of an action which was brought by the present defendant's predecessor, Gildenhuys, against the present plaintiff so early as the year 1847. By the summons in that action, Gildenhuys prayed that Roux might be adjudged to remove his sheep, &c., "from a certain piece of ground forming part of the farm" Loeriefontein, and be interdicted from using the same in all time coming, and be decreed to pay £40 damages for his illegal use of the same. That summons was preceded by a letter from Gildenhuys' agent to Roux, dated Jan. 22, 1847, which informed him that, according to the diagram of Loeriefontein, Strydom's Valley and Magerman's Kraal belonged to Gildenhuys, indicating thereby that the right to these spots was that which was meant to be asserted by the summons. Roux was from home when the summons was served upon him, and so did not appear at the Circuit Court before which it was brought. Accordingly, "judgment for the plaintiff, damages £20, with costs, having the effect of a provisional sentence," was pronounced against him. This judgment was made upon the evidence of two witnesses, Lindigan and Westhuysen. Lindigan swore that he knew the beacons of Loeriefontein; that Roux had made a sheep kraal on that farm for about 2200 sheep; that "the kraal was made close to the fountain belonging to the farm; that this kraal being made there injured the water by the dung being carried out into the stream; that the sheep constantly fed upon Gildenhuys' farm during the period from September 5, 1846, until after the commencement of the present year," 1847. "I estimate the damages sustained by this combined trespass at £42." Westhuysen's evidence was to the same effect, and almost in the same terms. The object of the action therefore was to put an end to a trespass over a certain piece of ground for the future, and to obtain damages for the time bygone, and the effect of the judgment was to direct the discontinuance of a trespass and to award £20 damages.

In March, 1848, Roux issued a summons against the present defendant, Bezuidenhout, as executrix of Gildenhuys. This summons was issued in terms of Rules of Court 181, 182, and in conformity with the latter of these rules. After set-

ting forth the proceedings in April, 1847, it stated the grounds on which the present plaintiff prayed to have the judgment then pronounced reversed. These grounds were that he had employed Elemans, a Land Surveyor, to make a survey of his farm, in consequence of the letter addressed to him in January, 1847, by Gildenhuys' agent; that Elemans had surveyed the farm and had proved by his survey that the ground claimed by Gildenhuys, and which was in question in the action raised by him, and by reason of a supposed trespass, on which the damages had been awarded, was in truth the property of him, Roux; and that while he was away engaging Elemans to make this survey, Gildenhuys had raised the action and obtained the judgment of the Circuit Court, without any one consequently having been heard on his part. On this statement the present plaintiff prayed that the judgment of 1847 might be reversed and that all proper orders might be given for placing him in his just and proper position in regard to the said judgment and all its consequences, and that Bezuidenhout might be decreed to pay him £40 as his damages sustained by reason of the wrongful acts and proceedings of Gildenhuys in regard to the said piece of land. The frame of this summons appears to me to be in conformity with the Rules of Court with the exception of the concluding prayer as to damages, which seems to me to be irregular and incompetent, as all that the party could ask or obtain by this form of proceeding was a reversal or alteration of the judgment he complained of.

Appearance was made for both of the parties before the CHIEF JUSTICE at the Circuit Court at Beaufort, May 13, 1848. On that day an order was made referring the actions to Elemans and Stretch, Land Surveyors, as Arbitrators. That reference, however, fell to the ground for reasons which it is unnecessary to notice, and on August 11, 1853, the order for reference was cancelled by this Court, and it was further ordered that the parties be placed in the same position respectively as they were in at the time when the order for reference was made. The case then came on for trial upon Roux' summons at the Circuit Court at Beaufort, held May 12, 1854, when, after witnesses had been examined for both parties, an order was made of consent removing the case to this Court for "judgment." It seems that that order

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had been made on the understanding that if the evidence of Stretch, the Land Surveyor, could be obtained, the plaintiff should have the benefit of it, notwithstanding the order had remitted the case for "judgment" and not for "trial."

The plaintiff availed himself of the opportunity of Stretch being in Cape Town to have the benefit of his testimony and examine him before this Court. The case was then argued upon the effect of the evidence, and is now set down for judgment.

Before I give my opinion, I may observe that in the original action there was no pleading by any of the parties whatever, except the Circuit Court summons at the instance of Gildenhuys—that the summons did not state the *locus in quo;* neither did the two witnesses who were examined under it; neither did the judgment which followed upon it. I may further observe that in the present action, which I may call one of review, there is no pleading whatever except the summons and that the *locus in quo* is not ascertainable from it, further than may be done inferentially from the recital that the plaintiff Roux had been accustomed to consider that "a certain piece of ground commonly termed Strydoms Valley" belonged to the farm Zoetendal's Valley, but that on January 22, 1847, Gildenhuys' agent wrote him that he found it was in Loeriefontein, and demanded damage for a trespass thereupon. All this dispute, therefore, has been continued for eight years upon a record which does not show what it has been all about, except inferentially. I make this observation because the whole stress of the argument at the bar was confined to the question of right or no right to water, wherever that water might be; whereas the true question raised by the original summons and that only which can be embraced by the present summons and be decided by this Court was in regard to the grazing of sheep and the building of a kraal by the present plaintiff upon ground alleged to be within the present defendant's farm. It was for these trespasses that the £20 damages was awarded by the judgment of April, 1847. With the observation then that the question is not as to the right in the plaintiff or defendant to a fountain or piece of water, but as to the right of one or other of the parties to a piece of ground, on which the present plaintiff had erected a kraal capable of containing 2000 sheep, and over which he had fed his sheep prior to

1847, let me now address myself to the evidence which has been adduced by the parties.

That evidence consists of written documents and of oral testimony. In the foreground of the documentary evidence are the original grants of the farms of plaintiff and defendant with the diagrams of each farm annexed to its grant. The rest of the documentary evidence consists of different plans of the country. First there is the plan (B) which gives a general view of all the farms in the field cornetcy of Tarka, in which the farms in question are situated; then there is a plan (A) of the farm Zoetendals Valley made by Elemans in 1847 and produced to the Circuit Court in 1854. Then there is a plan of the farms Zoetendal and Loeriefontein made by Elemans in December, 1848, and lastly there is a plan (F) by Auret—it is not stated when made—produced to the Circuit Court in 1854. Having stated what the documentary evidence consists of, I shall postpone making any observation upon it until after I have noticed the oral testimony. I shall begin with the witnesses of the present defendant. It is not necessary to consider the evidence of Lindigan and Westhuysen, who were examined in 1847, because the evidence of both is confined to establishing the fact that a trespass had been made without saying anything to show the locality of the trespass, on which the true question in dispute rests. Lindigan said, "The kraal was made close to the fountain belonging to the farm," and Westhuysen said "The kraal is above plaintiff's fountain;" but neither of them said what the name of the fountain was, nor where it was situated; neither did either of them say what was the name of the ground or where it was situated, over which the 2200 sheep had pastured. So much for the evidence of 1847.

I come then to the evidence of the witnesses examined by the defendant in 1854. The first of these is Van Staden, who says: "I knew a place called Strydoms Vley. According to the measurement of Stretch it was to be within the farm Loeriefontein. I recollect Van Vuuren asking for Strydoms Vley; he asked for the whole of the vley. Mr. Ryneveld would not allow him the vley, but permitted him to water his cattle there. I assisted in placing some of the landmarks. Barend Booysen and myself fixed the beacons. I put up a beacon near Strydoms Vley by direction of Stretch. The beacons

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were put up with dry stones." James Wright says: "Strydoms Vley according to Stretch's survey was to fall within Loeriefontein; there were some stones put up at Strydoms Vley. They were intended to be a beacon. I accompanied Mr. Auret when he made a survey of Loeriefontein the other day. I pointed out some beacons to Mr. Auret; they were the same which Stretch had directed Van Staden to erect. Van der Westhuysen and myself came to the conclusion that, according to the diagram, the beacon at Baakens kop was not a proper one, for it was very far in Zoetendals Vley."

Barend Swanepoel says: "I was present at the inspections in 1830 and 1833. I recollect Van Vuuren applying to the Civil Commissioner; he asked for permission to have water at Strydoms Vley. Strydoms Vley was assigned to Loeriefontein. I was present when Booysen pointed out certain beacons to Mr. Auret. Those pointed out were the same which were ordered by Stretch to be erected when he made the survey."

J. Van Vuuren says: "I know the beacons between the two farms. I have seen them standing for about eighteen or nineteen years. Strydoms Vley and the house of Gildenhuys fall within Loeriefontein." This witness then speaks of Elemans' survey, and according to my copy of the evidence uses the words "The house and Strydoms Vley belong to Roux." As these words contradict what he had just previously said I suppose there has been an error in the copying here, and that what the witness really did say was that "according to Elemans' survey Strydoms Vley belonged to Roux." This witness concludes his evidence thus: "I never heard Roux make any claim to the ground before I received his diagram."

A. Gildenhuys says: "Before the titles were issued there were beacons standing. According to these beacons Strydoms Vley and the house at Loeriefontein fell within the ground of Loeriefontein. Above Strydoms Vley a single stone was placed as a beacon, about two and a half feet high. Behind Strydoms Vley, above the kop, stones were heaped up four feet high."

B. M. Booysen says he was with Mr. Stretch when he made the survey in 1833, and pointed out to him where the beacons were to be erected. "I assisted in erecting them.

According to the beacons, Strydoms Vley falls within Loeriefontein. I pointed out these beacons to Auret, the Surveyor, as the boundary."

The last witness for defendant, J. B. Auret, says he was employed by the defendant to make a survey of Loeriefontein, "according to beacons pointed out to me by Booysen and other witnesses who have been examined." The witness produces his survey, which is the plan (F) I have already mentioned. "According to that survey Strydoms Vley and the house fall within Loeriefontein." "I have referred to the diagram of Zoetendals Vley, and it does not correspond *with the beacons of Loeriefontein.*" The witness then suggests that the maker of the diagram might have made a mistake, and endeavours to point out how this mistake might have arisen, and continues: "My diagram *differs entirely from the diagram annexed to the titles of Loeriefontein.* Strydoms Vley falls within Zoetendals Vley according to the diagram annexed to the grant. The diagram annexed to the title of Loeriefontein is *an eleven-sided figure, whereas mine is one of seven sides.* Wittepoort on my plan corresponds with the beacon on the diagram of Zoetendals Vley."

This exhausts the oral evidence for the defendant so far as I think it necessary to notice it, and what I have given is in fact an abstract of all that is most favourable to defendant's case. When we come to analyse this evidence it amounts to no more than this, that, according to the testimony of eight witnesses, several of whom were related to the defendant, the farm Loeriefontein, according to certain beacons which they pointed out, ought to be of a certain form and in a certain locality, which form and locality are ascertained by the survey of Auret marked F—which survey Auret swears differs, not only from the diagram annexed to the plaintiff's title, but even from the diagram annexed to the title of defendant herself. This difference consists, according to Auret, not only in giving a locality to defendant's farm different from that which is assigned to it in the diagram annexed to the title from the Crown, but also in giving an external line of boundaries *of a totally different figure* from that which is shewn by the diagram in her title. The figure in the diagram is *eleven-sided*, while that in Auret's survey is *seven-sided.* If the security of land property in the Colony is to depend upon the transitory,

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perishable testimony of witnesses with respect to the position of bounding beacons, coupled with the still more transitor evidence of the beacons themselves, which may be moved hither and thither by any one; if the title to land property is to depend upon such evidence as this, irrespective altogether of written title and surveys formally made and formally recorded, the case of the defendant may be considered to be fully established by the evidence I have referred to, and the judgment of the Court should be for the defendant. But I apprehend the Court will never sanction a doctrine so dangerous in its consequences. I am far from saying that, if the boundaries of any two given properties cannot be ascertained from the titles consisting of the grants from the Crown with the diagrams annexed, this Court cannot examine witnesses to explain and remove the difficulties and thus ascertain the rights of the grantees. But I must say that where, as in this case, there is no such difficulty, where neither the grants nor the diagrams conflict but on the contrary are quite reconcilable with each other, and where land can be found to satisfy the terms of both grants and the figures and dimensions of both diagrams, it is beyond the power of the Court to receive evidence of local boundaries and of possession according to these boundaries, with the view of giving its judgment in conformity with that evidence but in direct contradiction to the terms of the record of the Royal grant. To do so would be to assume a power to remodify the grants of the Crown—in fact to give to one party and take from another—a power not within the functions of a Court and pregnant with the evil of creating the greatest doubt and uncertainty as to the titles to land.

As, therefore, the evidence of the defendant is confined entirely to a contradiction of the diagram annexed to her own title, as well as of the diagram annexed to the plaintiff's title, I feel myself constrained to throw it entirely out of view, as evidence, which, if its effect could have been foreseen, should never have been allowed to have been led.

Relieved of defendant's evidence, the case is a very simple one: so simple as to make it unnecessary for me to do more than take a very slight notice of the evidence for the plaintiff. Auret, the defendant's own witness, says: "Strydoms Vley falls within Zoetendals Vley according to the diagram annexed to the grant." Then Elemans, plaintiff's

witness, says: "According to plan and original diagram, Strydoms Vley falls far within the boundary of Zoetendal's Vley." Then Stretch, who was the Surveyor who made the diagrams annexed to the two titles, says: "According to the grant and the diagrams annexed, Strydoms Vley falls within Zoetendals Vley." "According to my professional knowledge Strydoms Vley lies within Zoetendals farm. At the inspection in 1833, Ryneveld placed it in that farm. I speak to that as a fact, without reference to diagrams or plans. Strydoms Vley was in Loeriefontein originally. In 1833 the vley was given to Zoetendals Vley, and Groot Loeriefontein was then added to Loeriefontein. I swear that Strydoms Vley was given to Zoetendals Vley independent of measurement altogether. I swear that as an absolute fact."

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Now this oral testimony is in conformity with and in support of the titles and diagrams, and in my opinion is invincible so far as it goes. But let me now notice the matter as it is affected by the titles and diagrams themselves. The question between the parties, as I have before observed, is with regard to the right to Strydoms Vley. According to the evidence of the diagrams annexed to the titles Strydoms Vley is not mentioned in terms upon the diagram of Zoetendals Vley, but in the diagram of Loeriefontein the words "Strydoms Vley" appear outside the figure of the diagram, and inside the figure of the diagram opposite the words I have just quoted are these words: "Small spring in common to Zoetendals Valley." Now Stretch in his evidence says: "The water of Strydoms Vley runs into the marshy ground which is called by some the Vley and by others the Spring. Mr. Ryneveld cut it right across. He left the large water on the right called Loeriefontein, and the weak water on the left called Strydoms Vley." This evidence seems to correspond with the diagrams of Loeriefontein and to explain the words which I have quoted as being written upon it. It was assumed in the course of the argument that the disputed ground was at the point of the farm where the words I have quoted are written. But that could only be possible on the assumption that the defendant adhered to the diagrams annexed to the titles, whereas his whole case is that these diagrams are erroneous, and that the figure of his farm and its locality is to be ascertained according to the plan of Auret marked F, which brings his boundary line far

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within the figure of Zoetendals farm according to the original diagram, and leaves out altogether the point at which, on the original diagram of Loeriefontein, the words I have quoted are written.

But there can be no doubt that the *locus in quo* is not at the point of the diagram of Loeriefontein at which the words quoted are written, but at a totally different point.

In Elemans' diagram, made in 1848 in conformity with the original diagrams, so far as regards the external figures of the farms, I find the words "Real Strydoms Valley" written at a point far within the boundaries of Zoetendals Vley; and when I turn to the plan "A," which has upon it the figure of Loeriefontein, according to Auret's plan "F" drawn for the purpose of showing how that figure would run into the diagram of Zoetendals Vley, if it were assumed to be the correct figure instead of the figure in the diagram annexed to the title of Loeriefontein, I find it makes the boundary of Loeriefontein cut through the very point at which, on Elemans' plan of 1848, the "Real Strydoms Valley" is marked. This therefore is the true *locus in quo*, as is shewn by Auret, who swears that "according to Elemans' survey, Strydoms Vley and the house fall "*within Zoetendals Valley about* 500 *roods*," and that survey he swears is perfectly correct according to diagram. And Stretch in his evidence says: "Strydoms Vley is within Zoetendals farm 300 roods as far as I can recollect." And when I apply the scale to Elemans' plan of 1848, I find that the "Real Strydoms Vley" is just 380 roods within the boundary line of Zoetendals Vley,—and when I apply the scale to Elemans' plan marked "A" I find the same thing. Now the point on the original diagrams which was argued to be the place in dispute, so far from being hundreds of roods *within* the boundary line of Zoetendals Vley, is upon the very boundary line; so close that according to the Surveyor-General, the place of the water, supposing that to be the subject of dispute, might depend on very nice measurement to shew whether it was on one or the other side of the boundary line.

If then the "Real Strydoms Vley" be the Strydoms Vley which is claimed by the defendant, as I have no doubt it is, and there is no dispute about the "Strydoms Valley" or "the small spring in common to Zoetendals Valley," marked at a totally different point on the original diagram of

Loeriefontein, then, if I am right in holding that this Court has no power to consider evidence which has for its object to displace or overthrow the original diagrams, the case of the defendant is at an end: because, according to these diagrams, "Real Strydoms Vley" is indubitably about 380 roods within the boundary line of Zoetendals Valley, and cannot therefore form the subject of any claim on the part of defendant. Before finally disposing of the case, I may take notice of the indubitable hardship to the defendant in the circumstance that his house has been erected, with the knowledge of the plaintiff, upon ground greatly within the boundary line of the plaintiff's farm, according to my judgment, if that shall be adopted by the Court. This seems to have arisen from the fact sworn to by Stretch, that, according to the division of the two farms by him in 1830, the ground of Strydoms Vley; and on which the defendant's house is erected, was within the boundary of the farm given to defendant, and that the parties possessed according to that arrangement, until the issue many years afterwards of the title and diagram, showing the boundaries according to the arrangement of 1833 whereby that ground was taken from Loeriefontein and given to Zoetendals Vley. In truth, the object of the original action and of the defence to the present one was to accomplish a title, according to the arrangement of 1830, and in conformity with the possession after that date, and to overturn the division made in 1833 and the title following upon it. The hardship which the defendant has sustained in being allowed to possess and build, in unavoidable ignorance that the land on which he built was not his, may or may not give him a right to compensation to be obtained from some quarter and in some way, but it can give him no right to ask this Court to vary the Royal grant, and to expel the plaintiff from the ground in question, or to ask damages from him for coming upon it. The only other circumstance requiring notice is the clause in the conditions to the grant of Loeriefontein, "that the water of the Strydoms Valley shall be used in common between this place and the farm named Zoetendals Valley." This, it was supposed, gave invincible evidence that Strydoms Valley belonged to Loeriefontein, otherwise no servitude, such as is created by these words, could have been attached to the grant of that farm. But that is a complete misapprehension. The words of

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this clause will be quite satisfied by referring their application to that point on the boundary line between the two farms where the words "Strydoms Valley" are written on the Zoetendal side, and the words "small spring in common to Zoetendals Valley" are written on the Loeriefontein side. The servitude is evidently applicable to the water at that point on the boundary line between the two farms, and not to the water, if there be any, or to the land at the "Real Strydoms Valley," 380 roods *within* Zoetendals Valley.

I am therefore of opinion that the judgment of 1847 should be reversed with costs. With regard to the prayer of the plaintiff's summons of review, that the defendant should be decreed to pay him damages, that was obviously an incompetent prayer and can receive no effect, as all he was entitled to ask was a review of the decision against him. He could not in that form of proceeding originate any claim against the defendant.

[Plaintiff's Attorneys, REDELINGHUYS & WESSELS.
Defendant's Attorneys, J. & H. REID.]

SCHIKKERLING *vs.* DE BEER.

Provisional sentence.—Service of copy of note.

The defendant, married in community to K., was sued on a promissory note made in favour of plaintiff by K. before her marriage with defendant, for goods bought by her (K.) *at a public sale of the joint estate of K. and her first husband, deceased. Plaintiff and K. were executors of the joint estate, and plaintiff was administering executor. Subsequently to the purchase by K., the joint estate was surrendered as insolvent. K. had obtained her certificate of discharge under* Ord. 6, 1843, § 117. *The Court granted provisional sentence.* [EBDEN, J., *diss.*]

The copy of a promissory note served on the defendant did not contain certain figures and reckoning on the back of the original; the affidavit of plaintiff's attorney stated that these had been made by plaintiff at defendant's request

after issue of summons: the Court granted provisional sentence, there not appearing to be a good defence on the merits.

1855. June 7.

Schikkerling vs. De Beer.

Provisional sentence was claimed against S. A. de Beer, married in community to one M. R. Kotzé, for the sum of 266. 6. 4 rds. or £20 0*s.* 3*d.*, the balance due upon a promissory note dated the 23rd of March, 1848, originally for 1087. 7. 2 rds. or £81 11*s.* 11*d.*, made in favour of plaintiff and signed by M. R. Kotzé. It was stated in the note that the debt was "arising from goods bought by and received by me," and it was made payable three months after date.

An endorsement appeared upon the back of the note; certain figures and reckoning being written thereon, but all the figures had lines drawn across for obliteration. The affidavit of plaintiff's attorney stated that these figures, &c., were made by plaintiff at defendant's request after the issue of summons, and that the note when given to deponent to proceed upon was accompanied by a memorandum: further, that defendant had in April promised to deponent that he would pay the balance due on the note.

Defendant's affidavit stated that he was married in community to M. R. Kotzé, widow of H. N. Kotzé, in February, 1853; that H. N. Kotzé died on January 7, 1848, and that plaintiff and M. R. Kotzé were appointed executor and executrix in his estate: that he had been informed by his wife that at a sale held by the executors of H. N. Kotzé she purchased certain articles amounting to about £20, but that she never purchased to the amount of £81 11*s.* 11*d.* and has not paid on account of the said note any sums which could have reduced the same to £20 0*s.* 3*d.* That the estate of H. N. Kotzé was surrendered as insolvent by plaintiff in his capacity as aforesaid on February 19, 1850: that an amount of £101 14*s.* 5*d.* has been brought up in the schedules belonging to the joint estate, but that no account has been filed by plaintiff as administering executor.

That one Van der Poel was appointed sole trustee in H. N. Kotzé's insolvent estate; that deponent applied to him for particulars of the amount received by him from the executor of the joint estate, or for an account of the administration of the executors, but has never received the same; that M. R. Kotzé has obtained her certificate and

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discharge from the creditors of H. N. Kotzé, confirmed by the Court on June 5, 1855. The affidavit of Meintjes, defendant's attorney, stated that he had applied to plaintiff and to his attorney for particulars of the amounts paid off the said note, but that they said they had no information beyond the note, and memorandum; that deponent had applied to plaintiff for an account of his administration of the estate of H. N. Kotzé, and that plaintiff said he had handed the account to Van der Poel, but that the note sued on was given by M. R. Kotzé, surviving widow of H. N. Kotzé, for goods purchased by her at a public sale held for account of the joint estate of herself and deceased husband, previous to surrender of the said estate; that the note was reduced by payments made by one Redelinghuys, for whom the said M. R. Kotzé purchased some of the goods for which the said note was given by her.

The endorsement on the back of the note did not appear upon the copy served on defendant.

Watermeyer, for defendant, objected that a full copy of the note had not been served upon the defendant, and referred to *Serrurier* v. *Executor of Cautz** (Aug. 21, 1851).

Porter, A.G., for plaintiff, contended that the copy served need only contain what constituted the contract and liability between the parties: anything else on the note would be irrelevant and needless.

WYLDE, C.J., agreed with the argument of plaintiff's counsel.

BELL and EBDEN, JJ., considered that everything written on the note should be furnished to defendant.

But upon the merits

THE COURT (EBDEN, J., *diss.*) granted provisional sentence.

[Plaintiff's Attorneys, G. J. DE KORTÉ.
Defendant's Attorneys, FAIRBRIDGE, HULL & MEINTJIES.]

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* Reported 1 Searle, p. 106.

MURRAY *vs.* ROOME AND SOREY.

Pleading.—Account annexed to plea.—Contract for building of ship.—Risk.

Under a contract for the building of a ship, until the ship is in deep water, she is at the risk of the builders.

The defendant was sued for the price of a ship built for him by plaintiff. He pleaded that the ship sustained injury whilst being launched, and that he was entitled to set off the amount of the damage, and annexed to the plea an account showing the amount of deductions. No injury to the ship was proved, but it was proved that defendant had supplied to plaintiff an anchor and cable in order to complete the launch; for which a charge was made in the account annexed to the plea. Held (EBDEN, J., *diss.*), *that as the plea only alleged injury to the ship, the Court could not take notice of this item in the account.*

1855. June 12.

Murray *vs.* Roome & Sorey.

The defendants, Roome & Sorey, boatmen carrying on business in Cape Town, were summoned by Murray & Prince, the plaintiffs, shipwrights, for the sum of £59 2*s.* 11*d.* for work and labour and materials supplied, and also for £560, being the price of a water-tank, built by plaintiffs for defendants under a written agreement and delivered by them to defendants. Credit was allowed in the declaration for £202. The defendants admitted the claim of £59 2*s.* 11*d.* less 5 p.c. discount for cash, and likewise admitted their liability for the sum of £560 for the tank when delivered to them, and further pleaded as follows:—"And the said defendants admit that before the said action was brought, the said tank had been delivered to them, but the said defendants say that before the said tank was delivered to them, and while the said plaintiffs were in the act of delivering, viz. while the tank was being launched, the tank sustained certain damages, arising from the inartistic, unbusinesslike and improper way of launching by and mismanagement of the plaintiffs, which said damages and injuries the said defendants at the instance and request of the plaintiffs undertook to repair and did repair, for all which repairs, and for work and labour done, and for goods supplied for that purpose, and for money laid out

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or expended in that behalf, the plaintiffs became indebted to defendants in the sum of £46 6*s.* 3*d.*," as per account annexed, which defendants prayed might be considered as inserted. Deducting this sum as due to them and the amount acknowledged to have been received, the defendants tendered by their plea (as they had done before action) the sum of £372 17*s.* 6*d.*, which tender they prayed should be adjudged sufficient. From the evidence it appeared that on Monday, Oct. 9, about 4 p.m., the water-tank, built under the agreement above mentioned, was launched. The plaintiffs and defendants were present at the launch. Everything appeared to be in proper order—the vessel was let off the blocks and christened, and the dog-shores being knocked away, she went off, but only to the extent of the ways, when, the water being insufficient, she was stopped by the rocks and could not be moved further. She was examined that evening and found to have sustained no injury. On the following morning she was again examined both by plaintiffs and defendants and found to have received no damage. Slides were laid under the vessel on the rock and preparations made to get her off. For this purpose an anchor and coir cable was supplied on the 10th by defendants and laid down by them. This having been done the plaintiffs got the vessel off, by heaving on this anchor. A claim of £25 for laying down this anchor and cable, in weather described by the Port Captain as having been gloomy and dark though there was no danger, was the principal item in the account for £43 6*s.* 3*d.* claimed by defendants against plaintiffs. The other items in the account were for expenses incurred on Nov. 20 in having the vessel hauled on shore for the purpose of inspecting whether any injury had been sustained and some small alterations required on account of her alleged departure from contract by the builders. It appeared plain that the accident had been caused solely by the insufficiency of water at the time of the launch. Neither party appeared to have had any objection to the launch on the Monday, though on the Saturday, 7th, the water at high tide was at least a foot higher. On the part of defendants, evidence was adduced for the purpose of showing that it is the builder's duty to deliver the ship in deep water, and that until the vessel floats the owner has nothing to do with it; all remains at the builder's risk: that the anchor and cable were hired by plaintiffs, whose duty it

was so to deliver the vessel, from defendants, and that £25 was a reasonable sum for the laying down and use of anchor and cable, by which the vessel was got off the rocks and floated. Captain Wilson, the Port Captain, stated that among strangers £25 would be a very reasonable claim: between owners and builders, if the case had been his own, £15 would have been the charge he would have made. Evidence was also given, that when one of the plaintiffs came for the anchor and cable, he said to the son of one of defendants that "it was a bad job, and he hoped they would not charge too much for the anchor." Mr. White, ship-builder, called by defendants, stated that in Table Bay, in the only case in which in his experience there had been an accident in the launching, viz. the *Adderley*, the owner had rendered every assistance in getting the vessel off without making any charge against the builders.

Porter, A.G. (with him *Watermeyer*) for plaintiffs.
Brand, C. J., for defendants.

The majority of THE COURT (WYLDE, C. J., and BELL, J.) were of opinion that under the plea no evidence could be given of the claim made by defendants for the hire of the anchor and cable, and the other charges amounting to £43 6*s.* 3*d.* The plea claimed for damage and injuries repaired. The evidence showed that no damage or injury had been sustained; no item therefore in the account annexed to the plea could be entertained under this plea.* At the same time with reference to the claim of £25, although it was clear law that until delivery in deep water the vessel was at the risk of the builders, and, therefore, that defendants were entitled in law to some amount for the use of their anchor and cable, yet that the charge by defendants for their own anchor to assist the builders of a vessel for themselves, did not, under the circumstances, merit any favourable consideration. If the plea had admitted it, they would have been obliged to give some small amount for the service rendered, but it would certainly not have been more than the £15 mentioned by Captain Wilson (probably in the

* See Rule 334 (*a*). 10 of 1880 Ed.

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opinion of BELL, J., not more than £5), it being clear that there had been no risk.

EBDEN, J., was of opinion that the plea, which prayed that the account annexed should be considered as embodied in it, was sufficient, according to the practice of the Court, to admit the consideration of the item of £25 for laying down the anchor, and of £1 10*s.* for coolie-hire in hauling over the vessel for inspection in November. He would have allowed £15 for the anchor according to Captain Wilson's evidence, and the £1 10*s.*, but in that case, as the other items could not be entertained, the tender would have been insufficient.

Judgment for plaintiffs for £414 3*s.* 8*d.* with costs.

[Plaintiffs' Attorneys, J. & H. REID.
Defendants' Attorneys, FAIRBRIDGE, HULL & MENTJIES.]

PENKETH *vs.* CALVERT.*

Jurisdiction.—Quorum of Judges.—Act 10, 1855, §§ 2, 3, 5, 6, 7.

An objection to the jurisdiction of the Supreme Court on account of no fourth Judge having been appointed under the provisions of Act 10, 1855, § 2, *which provides "the Supreme Court shall henceforth consist of one Chief Justice and three Puisne Judges," overruled.* [WYLDE, C.J., *diss.*]

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In this case a decree of civil imprisonment was prayed upon an insufficient levy of execution, the writ having been taken out to enforce payment of an award which had been made a Rule of Court on February 27.

Watermeyer, for the defendant, objected that there existed no authority by which such a decree could be granted, there not being, as the law required there should be, a Supreme Court consisting of the Chief Justice and three Puisne Judges in existence. Act 10, 1855, § 2, was as follows:—

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* This and the next four cases, as also the case of *Roux* vs. *Gildenhuys' Executor*, p. 142, appeared in somewhat similar form in a pamphlet reprinted from the newspaper reports.

"The Supreme Court as aforesaid shall henceforth consist of one Chief Justice and three puisne judges;" and § 7 was, "This Act shall commence and take effect from the promulgation thereof." The Act, it was admitted, was promulgated in the *Gazette* on June 12th. The law rendered a change obligatory, and no change had taken place. The powers of a Supreme Court of three judges ceased on June 12th; from that date there was no longer any authority under the Charter of 1834.

§ 3 was: "It shall be lawful for the Governor to appoint provisionally until Her Majesty's pleasure be known the puisne judge at present required to complete the number aforesaid of three puisne judges." It was not intended by this that the Governor was required immediately to make such appointment, or even that he should make it at all; but it was intended and required that immediately upon his promulgation of the law, or rather concurrently with such promulgation—which he might, according to his discretion, delay till he had decided upon the appointment—the appointment should take place in order to render the Supreme Court created by law in an efficient state to carry on the judicial business of the country. The law once promulgated, the existence of the Court according to law was imperative.

§ 5 provides that the number of judges of the *said* Supreme Court necessary to form a quorum *thereof* (that is, the Supreme Court constituted by § 2, consisting of a Chief Justice and three puisne judges) should be two; and § 6 is as follows: "So long as the number of judges of the Supreme Court, for the time being, shall be not less than such quorum as aforesaid, the said Court shall be competent to execute all and every the powers, jurisdiction, and authority belonging to or vested in the said Court." "Such quorum" signifies such proportion capable of transacting business, of a larger body which has existed, not which never has had any existence. The words must refer to § 5, where the judges are a quorum of the "said Court." What Court? The Court created under § 2, consisting of four judges. Sect. 6 was introduced to meet the case of unforeseen accident, as occurred in 1850 on the death of MENZIES, J., when the Supreme Court consisting of three judges was rendered incapable of action until a provisional appointment to com-

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plete the Bench had taken place. If a Court once consisting of four judges according to law, by unforeseen accident, death, resignation or incapacity, were deprived of one judge then there will not, as without this section there would be, be an utter paralysis of judicial power in the Colony as there was in the opinion of the two remaining judges in 1850. But to strain these words, intended to provide that in case of a temporary vacancy the functions of the Court should be proceeded with, into a meaning that there need not under the law be any appointment at all of a fourth judge, was not giving a legal interpretation to words.

Porter, A.G., contrà. From the date of promulgation of the Act of 1855, the Supreme Court existed as constituted by that Act, and the three judges or any two of them were a quorum of the Court capable of performing all the functions of the Court. It was fallacious to treat the Act as abolishing an old Court and creating a new. The Supreme Court continued to exist, and one additional judge was by the law grafted on to this Supreme Court which continued to exist. In contemplation of law, the Supreme Court was now a Court of four judges, although the Governor, who had the power to appoint, but was not required instantly to do so, had not appointed the new judge. It was impossible to conceive a moment of time when the Supreme Court had ceased to exist; such cessation of existence never was contemplated and never took place. It was necessary for defendant's argument to support an absolute cessation of the Supreme Court for some portion of time. No appointment could take place *concurrently* with the proclamation. The moment that intervened or would necessarily intervene between the promulgation and the appointment of the judge would, in accordance with defendant's argument, deprive the Colony of the Supreme Court even for that moment. If it were conceded, which was in fact conceded by the very argument, that for that moment of time the Supreme Court existed, although in that moment no appointment had taken place, where was the distinction in principle between the effect of a non-appointment during that portion of time, and the longer portion of time which has now elapsed without the appointment? Sect. 6 was inserted with the view of meeting the consequences which had resulted on the death of MENZIES, J., when his colleagues (WYLDE, C. J., and MUS-

GRAVE, J.) expressed the opinion* that they were powerless to act, though two formed a quorum; the Court having ceased to exist as required by the Charter. But if the words had been carefully considered in order to meet the case of a non-appointment, it would have been very difficult to select words more plainly calculated to express that, pending the non-appointment, the Governor being empowered to make the appointment, when he thought that he could fitly carry out the intentions of the Legislature and the object of the law, the three judges now existing or any two of them should be competent to execute all the powers and authorities vested in the Supreme Court which has never ceased to exist.

Further, it is impossible logically to distinguish between a non-appointment and a vacancy by death or otherwise. In the latter case it was admitted that legally there was no obligation to appoint until the Executive Government thought fit. The two judges forming the quorum might continue to exercise all the powers of the Court. A constitutional question might arise as to the non-filling up of the appointment. The sixth section covered both cases.

WYLDE, C.J., said:—I would have desired time for consideration, as I differ from my brother Judges, and it is very important that a question as to the competency of the Court should be free from all doubt. The question is, Can the three judges now sitting be a quorum under this Act? What Court does this Act contemplate? A Court of four judges, and not three. Now as a matter of fact no such Court has yet been established. No four judges have been appointed to exercise any jurisdiction; and how then can it be said that the three judges or two of them were a quorum of these four? The word quorum in its actual and legal signification signifies not only a lesser number who might perform the functions of a larger number, but a certain less number of those who had certain functions to perform. Where were the four, of whom the judges sitting formed a part, so as to execute the powers of the Court? The question is a very grave one, and one on which I would willingly have bestowed more consideration, but having

* See *R.* v. *Van Reenen*, 1 Searle, p. 8.

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given it all the consideration in my power, I am clear that we have not the jurisdiction which by law belongs to a Court of four and not three judges. I am of opinion therefore that the objection is valid.

BELL, J.:—This is one of those cases which should be decided at once, being one about which, for the sake of the public, there should be no delay. I have had the advantage, on the previous day, of a consultation with my brethren on this subject, and therefore have been able to give the question all due consideration. It is an important public matter, and on the public account I am bound to say that I have no doubt whatever that the objection taken is not good in law. This was my impression in the first instance, and continued to be so; and my mind has been confirmed by the further consideration afforded during the argument. The word Court in its proper signification does not signify three judges or four judges who are in common language called the Court. The Court consists not only of the judges, but of other officers—sheriff, registrar, and all other persons necessary for carrying out all the functions of the Court. There is no cessation to the existence of the Court by the fact that one of these persons has not been appointed. The Court may exist in *gremio juris* without the appointment and does exist without the appointment of all intended in law to carry out its powers. There is not by this Act any abolition of the Supreme Court, but one more judge is added. With reference to the opinion of the Judges in 1850 on the death of Mr. Justice Menzies, I would probably have differed from the Chief Justice and Mr. Justice Musgrave in such a case. But in the present instance, as if providing by anticipation for any objection that could be raised by reason of the non-appointment, the sixth section had been inserted. The fact that, spite of the sixth section, an argument could be raised, only proved that it was impossible to frame a clause to which objections could not be started. Sitting alone, I would not have permitted the objection to be argued.

EBDEN, J.:—I agree with my brother BELL that the objection is not good, but I am not prepared to say that the matter is free of doubt. I have however considered the question since my attention was called to it yesterday, and

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have satisfied myself that the sixth section is in its legal construction sufficient to constitute the three judges of the Supreme Court or any two of them a quorum to execute the powers of the Court under this Act.

Objection overruled and writ of civil imprisonment granted, but without costs.

CENTRAL ROAD BOARD *vs.* MEINTJES.

Ord. 8, 1843, §§ 3, 4, 26.—*Ord.* 12, 1844.—*Road Rates.*—*Main Roads.*—*Proclamation by Governor.*

The defendant was summoned by the plaintiffs, the Central Road Board, for payment of road-rates under Ords. 8. 1843, *and* 12, 1844. *He pleaded that the provisions of Ord.* 8, 1843, *had not been complied with, inasmuch as the plaintiffs had not recommended to the Governor any roads to be by him proclaimed as main roads, as required by sect.* 4, *and that the Board could only expend rates upon such duly proclaimed main roads; and that the rates collected by plaintiffs had not been expended upon the roads in the division wherein the rates were levied as required by sect.* 26. *These defences were sustained.*

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This action was removed from Graafreinet Circuit Court, where it was heard May 5, 1854, and the question raised was the validity of a rate levied by the Commissioners of the Road Board upon the inhabitants of Graafreinet.

The summons set forth—That on May 19, 1852, the plaintiffs, by virtue of the powers vested in them by Ord. 8, 1843, and Ord. 12, 1844, duly and legally assessed and imposed a rate for the purpose of Ord. 8, 1843, of one penny in the pound upon the value of all immovable property within the division of Graafreinet and liable to assessment under the said Ordinances, such rate to become due and payable on July 5, 1852, as by a public notice dated May 19, 1852, and signed by the plaintiffs' order, by their secretary,

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and published in the *Gazette* of May 20, 1852, will appear. That at the time of assessment of the said rate, defendant was and still is the owner of immovable property in said division liable to assessment, and that said rate so assessed amounted to £6 17*s.* 6*d.*, particulars of which had been furnished to defendant, that defendant did not pay the rate when due as required by Ord. 12, 1844, § 15, and has since refused, though requested to pay. And the plaintiffs prayed for judgment for this sum and costs.

The defendant pleaded:—1st. General issue.

2nd. That by Ord. 8, 1843, § 3, it is enacted that it shall and may be lawful for the said Board, and it shall be the duty of the said Board, so far as the means at their disposal will permit, to improve, and as much as may be bring into a fit and proper state the main roads throughout the Colony, and also to maintain and permanently preserve the said main roads in such fit and proper state. And further, that by § 4 it is enacted that it shall be lawful for the Governor by proclamation, to be by him from time to time issued, to declare what particular roads shall be deemed and taken to be main roads for the purpose of the said Board and this Ordinance, and that from the date of the passing of the Ordinance until the commencement of this action, no main road for the purpose of the Ordinance and the Board has ever been declared in the division of Graafreinet by the Governor in conformity with the requirements of § 4, and that until such proclamation of main roads, for the improvement, repair, and making of which the said Board was constituted, neither the defendant nor any other landholder in the division ought by law to be called upon by the plaintiffs to pay any such assessment.

3rd. That by Ord. 8, 1843, § 26, it is enacted that the entire amount of any rate which shall be assessed and levied in any particular division of the Colony shall be applied wholly and exclusively to the construction, maintenance and improvement of the main roads in that division and not otherwise. That for the purposes of the said Ordinance, as then alleged, the plaintiffs in 1844 assessed and levied upon the fixed property of the defendant and other landed proprietors of the division, a rate amounting to £1200, of which the defendant paid £6 17*s.* 6*d.*, the rate assessed upon his immovable property; that the said rate was paid by defen-

dant and others upon the faith that the amount of £1200 would be applied wholly and exclusively to the construction, &c., of the main roads in the division, but that no part of the £1200 has been so expended, but that the whole has been expended in the construction, &c., of main roads of other divisions, in direct contravention of § 26. That defendant is not bound by law to pay any further rate assessed by plaintiffs until the proceeds of the said rate levied in 1844 shall have been applied wholly and exclusively to the construction, &c., of the main roads in the division.

The following facts were admitted between the parties:—

That plaintiffs assessed the rate as set forth in the declaration.

That the defendant was at the time of the assessment and still is the proprietor of property liable to assessment, and that the rate so assessed amounted to £6 17*s.* 6*d.*

That from the date of the passing of the Ordinances no main road had been declared in the division.

That the plaintiffs did levy the rate amounting to £1200 in 1844, and that the defendant paid £6 17*s.* 6*d.* as the rate upon his property, and that no part of the rate had been expended upon the main roads in the division, and that the whole had been expended upon main roads in other divisions.

That upon the establishment of the Central Road Board in 1843 the Board did not recommend to the Governor to proclaim nor did he proclaim the then existing main roads of the Colony or roads commonly reputed such; that from time to time, according as the Board intended to go to work upon particular main roads, these roads had been proclaimed, and that in a few instances the Board had worked upon main roads not declared as such.

Porter, A.G., for the plaintiffs:—The Board by virtue of the assessment clauses of Ord. 8, 1843, possesses an absolute and unconditional power of taxation. If the prescribed mode in which the property of the Colony is to be valued and the assessment to be fixed have been strictly followed, no defence can be maintained against the payment of such duly imposed rate. The second plea made the proclamation of the main road a condition precedent to any power to be exercised by the Board; it was impossible to maintain this construction of the Ordinance, for §§ 20, 22,

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23, 24, 25 give absolute power to the Board without reference to such proclamations of main roads, to assess and recover rates, so soon as the valuation of the immovable property of the respective divisions shall have been completed. There is no such condition precedent expressed or implied in the law. The taxable power exists quite independently of such proclamation. Indeed it is not even obligatory on the Board or on the Governor to cause main roads to be proclaimed,—the words of the section give the Governor power to proclaim new main roads,—but there were old main roads in existence at the date of the Ordinance requiring no proclamation, and rates were to be levied as well for the improvement of existing roads as for the construction of new roads. The fact that there was no doubt of the meaning of the law, and the invalidity of any such plea as the first special plea, was established by the very payment of the first assessment, which is made matter of defence to the present claim in the second special plea. With respect to the second special plea, it assumed that a contract had been entered into between the plaintiffs and defendant on the payment of the first rate, and that expenditure in the division was a condition precedent to the payment of the present rate. The plea alleges that this tax, legally claimable, has been applied to improper purposes by taxing authority, and therefore payment is refused. It would be equally legitimate that any one dissatisfied with the Government should state in a plea that he would not pay customs duty, because the money levied was not expended in the way intended. The truth appeared to be that a battle with reference to a legislative enactment was being fought here instead of in the Council and Assembly. If the law pressed hardly, let it be modified. If it be thoroughly bad, let it be repealed. But not in this Court, which is bound to give effect to law: but in the halls of the Legislature, which alone has the power to make a better or a worse enactment which shall be the future law. It would not be difficult to give sound reasons why the Road Board did not waste strength and money by splitting up their labouring parties, both free and convict, into all the divisions at the same time, as was desired by the defendant and others in Graafreinet, but this was not the place for entering into these reasons. No one, however, acquainted with the

proceedings of the Road Board throughout the Colony could doubt that defendant and others who resist this rate, are acting most injuriously to the interests of their own division in the endeavour to render it impossible for the Road Board ever to act with full strength there as they had elsewhere done.

Watermeyer, for the defendant:—The plaintiffs' argument is based on the assumption that the Central Road Board are not accountable to a Court of law—that they are a mysterious, irresponsible body. This we deny. They have certain powers conferred on them by law and certain duties to perform by law, and the Court is to enquire whether these powers are fitly exercised, and these duties properly performed. The authorities of the Board extend only to main roads, and the only definition of main roads for the purposes of the Ordinance is given in sect. 4. Existing main roads, if to continue main roads for the purposes of the Ordinance, were to be proclaimed by the Governor. Whether this plan had been followed or not by the Board did not affect the question; they may or may not, according to the admissions, have worked upon roads, as main roads, before proclamation. This did not affect the requirements of the law. At the same time, whenever it suited the Board, they laid down the principle that without proclamation there was not a main road. Now, it being clear from sect. 4 that main roads existed for the purpose of the Board only by proclamation, —where there were main roads, they were not entitled to any assessment—duly proclaimed main roads first, and assessment thereupon—the landholders were entitled to. But it was stated that the payment of the first rate admitted that the proclamation of main roads was not necessary. The fact rather was that in law those who paid this first rate, although not legally compellable to do so, might be considered entitled to recover back the amount from the Board as illegally claimed and paid in good faith. At all events, one illegal claim satisfied does not give the claimant a right to a succession of illegalities. But, if it be granted, as in the second plea, that the first claim made in 1844, immediately after the passing of the Road Ordinance, and when the inhabitants of Graafreinet expected within some reasonable time to have some benefit from the powers conferred on the Board, was legal, § 26, which required that this rate should

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be expended in the division where it was levied, and not otherwise, was a decisive answer to the present claim. This section of the Ordinance, under which alone the Board has power to levy, and under which, by its constitution, it bound itself to act, has admittedly not been acted upon. This Board is not the Government, although possessing large powers; it is in no other position than any other Board or incorporated Company, and it is perfectly competent for the defendant and others to enquire whether the strict words of the law had been observed with reference to the former payment, before they could be compelled to pay a second time. The payment was on the faith that it would be expended according to § 26. The first rate not having been so expended, but being admitted to have been expended in contravention of this section, the defendant is entitled to claim, as he does, protection from this Court against further payments of such rates.

Cur. adv. vult.

Postea (July 13th),—

THE COURT (WYLDE, C.J., and BELL, J.) gave judgment for the defendant, with costs.

WYLDE, C. J., said :—In my opinion § 26 of Ord. 8, 1843, settles the question. It is clear and distinct that the entire proceeds of any rate assessed and levied in any particular division of the Colony shall be applied wholly and exclusively to the construction and improvement of the main roads lying and being in that division ; and further emphatically, to bind the Board and for the satisfaction of those liable to assessment, the words are added, "and not otherwise."

Now this Board, acknowledging that it had, as a rule, contravened this section, and that it did not expend the rates levied in this division within its limits, but, in contradiction of the express enactment of the law, did expend them "otherwise" for the benefit of other divisions,—acknowledging its repeated and constant violation of this law, comes into Court invoking the protection of this law, violated by itself against the defendant. The defendant is entitled

to come to the Court for protection against this action, and the Court is bound to interfere in his behalf, in like manner as they would be bound to interfere in any other case of injustice duly brought before them.

BELL, J.:—This is an action by the Central Board of Commissioners for Public Roads to compel J. J. Meintjes to pay to them an assessment of one penny in the pound, upon his immovable property in the division of Graafreinet—this assessment being made under the powers vested in these Commissioners by Ords. 8, 1843, and 12, 1844, on July 5th, 1852, and notified in the Government *Gazette* on May 20th, 1852, and alleged to amount, according to the valuation of defendant's property, to £6 17*s.* 6*d.* The defence pleaded to this action consists of three pleas. 1st. General issue. 2nd. That no landholder can be called on to pay any assessment for the purposes of the Ordinance until after the Governor shall have declared by proclamation what are to be taken to be main roads for the purpose of the Ordinances, and that the defendant is not liable for the assessment sued for, inasmuch as no such proclamation has been made within the division of Graafreinet since the passing of the first of these Ordinances. 3rd. That the defendant is not liable for the assessment sued for, inasmuch as the defendant paid £6 17*s.* 6*d.*, being his proportion of an aggregate rate of £1200 levied by the plaintiffs in the year 1844 upon the division of Graafreinet under the terms of the Ordinances; but no part of that rate has been expended by the plaintiffs upon the roads within that division, although by § 26 of Ord. 8, 1843, it is enacted that any rate levied in any particular division shall be expended exclusively upon the roads in that division.

It is not necessary to notice the formal plea of the general issue further than to observe that the defendant has in a paper of admissions substantially departed from that issue by admitting the facts in the declaration, the denial of which is implied in the plea. It must be assumed then that the plaintiffs have done everything to entitle them to recover the amount of the assessment sued for, unless their action shall fail upon the matters in avoidance, contained in the other pleas.

With regard to the second plea, it is substantially that no

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assessment could legally be levied by the plaintiffs until after the Governor had by his proclamation intimated to the community the particular roads upon which the assessment was to be expended.

The plaintiffs by their replication deny that there was any such "condition precedent," as they called it, to their title to levy the assessments authorized by the Ordinance. [His Lordship then referred to the terms of §§ 3, 4, and the preamble.] It would certainly admit of argument whether the plaintiffs under the terms of § 3 had power to construct any *new line* of road whatever. Such a power may be inferred perhaps from one expression, "*construction*," in the preamble, and from the term "*making*" in the last line of § 8, and in the first of § 9, and possibly from the expressions in the Ordinance which have escaped my observation, as I have not thought it worth while to direct more particularly to this part of the subject, for reasons which will appear presently. On the other hand, it would be matter of very reasonable and legitimate argument to say that the words "construction" and "making," as having regard to the "existing state and condition of the public roads," would be "required in order to put the said roads into a permanently serviceable state," and "towards putting the public roads in each division into thorough repair," these being the objects which, according to the preamble of the Ordinance, were inductive of its being passed, fortified as that construction would be by the terms of § 3 expressly declaring the duties of the Commissioners, which make no mention of anything as being included within these duties, but, "improving and bringing into a fit and proper state the main roads throughout the Colony, and also maintaining and permanently preserving the said main roads in such fit and proper state." [His Lordship then pointed out that in the Ordinance a distinction was observed between main roads and branch roads, and that under the Ordinance the power of declaring which was vested in the Governor, and continued:] Until, therefore, there was a proclamation by the Governor declaring what roads in the division of Graafreinet were to be deemed main roads, there was nothing upon which the Central Board of Commissioners could discharge the functions imposed upon them by § 3, nor for which they could be entitled to levy the assessment authorized by § 20, which,

in the language of that section, is to be "for the purpose of putting the main roads *of each respective division* into a good and serviceable state." [His Lordship then adverted to the question as to whether the defendant would have been justified in objecting to pay the rate in 1844, and continued:] Whatever hesitation I might have felt in sanctioning resistance to payment of the first rate, while as yet the roads upon which it was to be expended had not been ascertained by proclamation of the Governor, I can have none in saying that, after eight years have been allowed to elapse without that having been done, the defendant is not liable to be called upon for a further payment under a just construction of this Ordinance, according to those principles of sound reason and substantial justice which every Court must follow in applying the terms of a statute to the circumstances which it is intended to regulate. I am therefore of opinion that the defence upon the second plea is well founded and ought to be sustained. The next plea of defendant that remains for notice is the third, which denies his liability to pay the rate sued for, because the rate previously paid by him in 1844 for the division of Graafreinet has not been applied in terms of Ord. 8, 1843, § 26, "wholly and exclusively" to the construction and improvement of the main roads "within that division and not otherwise." [His Lordship recited §§ 20, 22, 24, 26, 27, 28 of the Ordinance.] From these enactments it appears that the Board have power to raise money by assessment upon the immovable property of the respective divisions for the purpose of putting the main roads of each respective division into a serviceable state. The money is to be raised by three several rates. The first is, without restriction, to be such as the Board shall consider necessary; but the number of rates are not to exceed three in all, and, in amount, the second and third are not to exceed one penny in the pound, and the entire proceeds of each rate is to be applied "exclusively" to the roads of the division in which it may have been raised, and "not otherwise"; and to secure this mode of application the Board is to keep an account of its general funds, or the moneys levied from all the divisions, in such a way as to show whether they have expended the money levied in any particular division upon the roads of that division "and not otherwise," and what amount had been contributed by each particular division for its own

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road with a view to the proportionate application, under § 27, of the moneys granted to the Board by the Legislative Council. And, that these matters might not be confined to discussions between the Governor and the Board, but be open to enquiry or investigation by those interested, the Board is directed to publish an abstract of its accounts, without delay, "for general information," that is to say, under the terms of § 28, half-yearly. It is difficult to conceive provisions more clearly intended to secure a separation of the divisions of the Colony into as many individual communities, each being assessed for its own roads, and for none other. And yet in the face of this, it was gravely contended on behalf of the plaintiffs that the Board was entitled to mass into one fund all the rates levied by them from time to time, from all the divisions of the Colony, and to apply that aggregate fund in the reparation of existing roads, and even in the construction of new roads, within any one particular division or any number of divisions, and that the inhabitants of any particular division, in which no part whatever of the aggregate fund has been expended, as has been the case with Graafreinet, have no right to complain of their interests having been thus postponed, by the reparation of their roads being deferred until some unknown time—that they will have got all that they are entitled to, when the Board, at finally making up its accounts, shall shew that the amount levied within the particular division has *in the long run* been expended upon the roads in that division. This argument deserves no better answer than to say that it is made in direct defiance of § 26, which says that the funds levied in each division shall be applied exclusively to the roads of that division, "and not otherwise"—to § 27, which shews that this mode of application was to go on from time to time, by directing that the money granted by the Legislative Council in general terms was to be applied among the divisions proportionately to the amount which might have been levied upon them by the Board—and to § 28, which, so far from permitting the Board to defer giving the ratepayers "information," as to how the money levied from them had been applied, until some indefinite, unknown period, declares that the Board shall give that information to them every half-year. This argument as to the right of the Board to mass in one the funds levied from all the divisions, under

an ultimate obligation merely to account, proving desperate, it was then argued for the plaintiffs that the ratepayers under this Order were in the same predicament as ordinary taxpayers, under an Order authorizing the levy of taxes for the general purposes of the Government; and that the defence to this action was to be regarded in the same light as if the defendant were seeking to recover back from the Board the assessment which he paid in 1844—and that if the defendant had any injury to be redressed, it could not be done in this Court; his only mode of remedy was by application to "the Legislature," by this term being meant the Governor and the old nominee Legislative Council. It seems that, upon ordinary constitutional principles, this argument is entirely fallacious upon every foot upon which it is rested. In the first place, the General Road Board is neither the Government, nor the representative of the Government, but a body of official persons whose "respective powers and duties" are, in the language of the preamble to the Order under which they are appointed, "limited by law," that law being this Order under which they are appointed, and who, although they receive no salary, are, by the concluding words of § 54, protected from being sued, only, where the matter complained of shall not "arise from their own gross negligence or wilful default." The "respective powers and duties" of the Board being "limited by the law" of this Order, it is the province of this Court to administer that law, as it is the province of this Court to administer the general law of the Colony; to enforce against the lieges the legal demands of this Board, and, on the other hand, to protect the lieges against the illegal demands of the Board, by refusing its assistance for their enforcement. But, further, the rates authorized to be levied under this Order have no analogy to the general taxes for defraying the expense of the machinery of government. The taxes are paid into the general Treasury, and no one of the public has right, more than another, to enquire as to their appropriation after being collected. But these road-rates cannot be levied for other than a specific purpose, and after being levied they cannot, under the express terms of the authority under which they are levied, be applied to any other than that specific purpose; and by the same authority means are provided for the public to ascertain whether this specific application has been

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observed, which are wholly wanting in regard to the general taxes. These means would be useless and fruitless if the ratepayers had no right to avail themselves of them to the effect of compelling observance of the specified application by all legal means. But, even if the Road Board were to be considered as representing the Government, to be part of it, and the road-rates to be part of the taxes, it is quite new to me to hear that, even in such a case, the subject cannot be protected in this Court from the illegal exactions of the Government. If the Road Board (whether it be or be not the Government) can levy its rates and enforce the levy without coming here, let it do so. But if it or the Government must come here to recover either road-rates or general taxes, this Court does not sit to enforce the exactions of the Government, without enquiring whether they are legal or illegal, referring the subject, in the language of the plaintiffs, to the Government or the Legislature for redress. The Government cannot recover even the general taxes, except through the intervention of the Courts of Law; and it is as old as Magna Charta that the Crown shall not take or imprison any man, "nor pass upon, nor condemn him, unless by the law of the land." If the law even as to the general taxes prescribe that they shall be levied only in a particular way, to that particular amount, and for a particular purpose, this Court will not enforce their levy in any other way, to any other amount, or for any other purpose. In all this, the Court is far from interfering with the province of the Government or of the Legislature, as was suggested from the bar in the course of the argument; it is strictly confining itself within its proper province, that of administering the law which has been passed by the Legislature.

Upon every ground, therefore, I am of opinion that the defendant should be absolved from the instance, with costs.

[Plaintiffs' Attorneys, J. & H. Reid.
Defendant's Attorneys, Fairbridge, Hull & Meintjes.]

BAYLEY *vs.* CHANDLER.

Libel.—Rules of Horse-Racing.—Stewards and Judges.—Innuendo.

The plaintiff was one of three stewards at certain horse-races, and as such had to decide in conjunction with the others on the results of the races, in cases of dispute: he had an interest in one of the races in which a horse of defendant's ran: a dispute as to the result of the race arose: according to the Turf Rules no steward shall take part in the decision of a race in which he has a pecuniary interest: the plaintiff consequently withdrew from the decision which was given against the defendant by one steward and two judges appointed in place of the other two stewards in conformity with the rules. All this was well known to the defendant. Subsequently plaintiff stated in an advertisement that defendant's horse "was distanced by three gentleman stewards who had not the slightest interest in the race." Defendant published a letter commenting upon this advertisement, in which he stated "It seems rather strange that the three gentleman stewards were disinterested parties when a certain gentleman steward won a good round sum" by defendant's horse being distanced. The plaintiff brought an action for libel, alleging that defendant's innuendo was that plaintiff had assisted in deciding in his own favour a race in which he had a pecuniary interest. Held, *that the innuendo would not bear this construction, and that therefore the defendant was entitled to judgment.* [EBDEN, J., *diss.*]

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This was an action of libel.

The declaration set forth—

That in April, 1854, certain horse-races were run at Green Point Race Course for various sums of money to be paid to the owners of the respective horses winning the said races. That Major Holmes, Rudolph Cloete and the plaintiff were appointed to act as stewards, part of their duty being to judge and determine all questions and disputes which might arise regarding what horses had and what horses had not won any race regard-

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ing which any dispute might arise. That by the known rules and customs of racing, no steward of any races ought to take upon himself to judge or determine or intermeddle with the judging or determining of any dispute relative to a race in respect of which such steward has any pecuniary interest, and that any steward who shall contrary to such rules and customs so intermeddle would be thereby brought into public odium and disgrace. That during the races aforesaid, a race was run between a horse called "Cossack" and a horse called "Surveyor," in regard to which race the plaintiff had a pecuniary interest of such a nature that if "Surveyor" should win the race, the plaintiff would lose a sum of money. That a question having arisen as to whether "Cossack" or "Surveyor" had won, the plaintiff as such steward, after declaring himself interested in the race wholly withdrew himself from the question and did not in any way directly or indirectly intermeddle with the hearing and determination of the question, which was heard and determined by other persons having no interest, who decided that "Surveyor" had lost. That the defendant being interested in the race was present at the hearing of this question and knew that the plaintiff had declined to intermeddle, and that he had done so because he had an interest in the race adverse to "Surveyor": that defendant contriving to injure the plaintiff and to cause it to be believed that he had been guilty of hearing and deciding a question in regard to a race in which he had a pecuniary interest, on November 28th, 1854, published, or caused to be published, a statement in the *Commercial Advertiser and Cape Town Mail* in the form of an advertisement signed "A Country Trainer" containing the false, malicious and defamatory matter following:—"It is stated by the individual who professes to judge others by his own standard of gentility that 'Surveyor' was distanced by three *gentleman stewards* who had not the slightest interest in the race. I do not wish to act so ungentlemanly as to give an unqualified contradiction to this statement. Judging, however, from what my informant assures me was the case, it seems rather strange that the three gentleman stewards were disinterested parties when a certain gentleman steward (meaning the plaintiff) won a good round sum by 'Surveyor' being distanced, which he most willingly pocketed, although paid by 'Surveyor's' owner, who was so

confident of the capabilities of his horse that he was willing to back him again against any horse in the Colony" (meaning that the plaintiff had as a steward heard and taken part in deciding in his own favour a race in which he had a pecuniary interest), to the damage of plaintiff of £5000 which was prayed for and costs.

The defendant pleaded the general issue.

For the plaintiff were examined Major Holmes, Captain Bird and Matthew Blake, who were the three judges who were appointed to decide whether the race should be awarded to "Cossack" or "Surveyor." It was proved by these witnesses that, according to racing practice, Captain Bird was appointed by plaintiff to act for him, seeing that he declined to act as judge on account of his interest in the race: that M. Blake was appointed by Holmes and Bird to act for R. Cloete, the steward, who was absent from the meeting that day. That these three judges had no interest whatever in the race: that the plaintiff was not present during their deliberations: that they heard all the evidence, including that of defendant, and that defendant expressed himself satisfied with their decision, which appeared to be the only one possible under the circumstances, it being shown that "Surveyor" had jostled and crossed "Cossack," also that there was good reason to suppose that defendant knew that plaintiff took no part in the decision because he was interested in the race: that there had been some unpleasantness at a race dinner given just before the meeting on account of the exclusion of some persons interested in racing who had come down from Swellindam and were not members of the S. A. Turf Club, that the plaintiff was the chairman at the dinner, and the defendant one of those excluded: that the plaintiff published an anonymous letter in the *Zuid Afrikaan*, November 23rd, 1854, in answer to an advertisement of one G. F. Muller with regard to a horse "Wellington." That in this letter the following appeared:— "With regard to Mr. Muller's allusion to the '*unfortunate "Surveyor"*' at the Cape Town Races last April, he has no right whatever to cast any reflection on the decision of the stewards, who were three gentlemen without the slightest interest in the race. . . . As for the *such treatment* Mr. G. F. Muller asserts some 'gentleman' received, Mr. Muller has been entirely misinformed. 'No gentleman' and no person

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with the slightest pretension to that character met with any rudeness." In answer to this on November 28th the advertisement signed a "Country Trainer," the publication of which defendant admitted, appeared, and in it was the paragraph containing the alleged libel. The defendant called no witnesses.

Porter, A.G., appeared for the plaintiff.

Watermeyer for the defendant.

Cur. adv. vult.

Posteà (Aug. 1st),—

THE COURT (by a majority: EBDEN, J., *diss.*) gave judgment for defendant with costs.

EBDEN, J., said:—I regret that I cannot agree with my brothers. The plaintiff has in my opinion proved his case and is entitled to my judgment. I consider the matter stated in the declaration as libellous, and that it will bear the innuendo which the plaintiff has attached to it, "meaning that the said plaintiff had as a steward heard and taken part in deciding in his own favour a race in which he had a pecuniary interest." Upon the evidence it appears clear to me that the defendant, smarting perhaps under his treatment by the South African Turf Club, or vexed at the loss of the race by "Surveyor," or goaded on by being called "no gentleman," intended the advertisement "Country Trainer" as a libel upon the plaintiff, and it seems difficult to me to understand the meaning of the communication unless you read it in that light. The plaintiff in the advertisement "the Great Wellington" says: "With regard to Mr. Muller's allusion to the unfortunate 'Surveyor' at the Cape Town Races, he has no right whatever to cast any reflection on the decision of the stewards, who were three gentlemen without the slightest interest in the race." This the defendant answers by the paragraph in question [His Lordship here read the paragraph]; which I find was intended to convey and does convey, reading and understanding the words according to their plain import and meaning, in their usual and ordinary sense, the libellous imputation against the plaintiff of which he complains, and which it is clearly proved the

defendant knew was false and was without the least foundation, as the plaintiff acted honourably and according to the rules of the Turf Club. While however I hold the defendant liable for the libel he has published, I cannot in assessing the damages forget the circumstances under which it was published, in mitigation. The plaintiff was the first anonymously to charge the defendant with being no gentleman and no person with the slightest pretension to that character, which was calculated to irritate the defendant. I think a judgment for the plaintiff with costs, damages £50, would about meet the justice of the case.

BELL, J., delivered an elaborate judgment giving a *resumé* of the facts and arguments, and was of opinion that the judgment of the Court should be for defendant, on the grounds that it was not proved that the terms of the alleged libel applied to the plaintiff, and that its terms did not amount to a libel as the plaintiff's innuendo was not made out, and that plaintiff was much to blame for his letter of November 23, and concluded thus:—"Therefore even if I could bring myself to the opinion that the words complained of were libellous in their character and used with an intention to injure the plaintiff, I should not be inclined to give more than nominal damages, feeling that the attack, if attack it be, had been invited and provoked by plaintiff's own language, and that it is of such a nature that the character of the plaintiff, whether as a gentleman or as a horse-breeder, or as a drawer of racing lotteries, in all of which positions he was successively presented by his counsel, will stand just as it did before the attack was made. But I have not been able to bring myself to think that the words are libellous; therefore I am of opinion that judgment should be given for defendant with costs.

WYLDE, C.J., said:—The history of proceedings in the Courts of Justice will satisfy us that libels are not thought trifling injuries to be lightly treated by the Courts in their judgments. I can quite enter into the feeling that a gentleman who believes himself aggrieved should come to a Court of Justice and thus give an opportunity to the party charged as a libeller to substantiate his statement or abide by the penalty. I am not therefore disposed to treat any

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libel which seriously affects character with slight consideration; and I think the delay which arose in the judgment of the Court will show that the fullest advantage of time for reflection was afforded to the case; and although there should be a difference in the Court, yet it will satisfy the parties that there has been a desire to decide the question according to conscience and justice. I have had the case much under consideration, and to me it is so plain that I have some difficulty now to say how I concur with my brother who has just given his judgment. I am as certain in my own mind that I could give no other judgment, as if the libel alleged had declared in terms what I take to be the construction of it. During the trial the argument of defendant's counsel was to me irresistible, and upon his argument and the construction put on the matter in proof according to that argument, I have come to the determination that there is no libel upon anybody—that there is nothing to show a libellous intention. Three stewards are concerned in the matter, and there are also three judges concerned. They are distinct and separate, and it is only by confusing the judges with the stewards, contrary to defendant's intention, who separates them, that the plaintiff can discover any ground for his action. This is the argument of the counsel for the defendant. By a confusion only, as it appears to me, of the sense, could the Attorney-General possibly elude that argument, nor could it be said that any cause of complaint is given to the plaintiff, except by this confusion. The question in this case must be decided as in all matters of this nature—What was the intention when the alleged libel was written, and what is its true meaning? The application of the libellous matter depends upon the truth of the *innuendo*—upon that hangs the verdict. Let us see what that *innuendo* is. It is the hinge of the case, and we have to do with nothing else, except as to the justice and application of that innuendo. It is alleged that the defendant meant by the alleged libel "that the plaintiff had as a steward heard and taken part in deciding in his own favour a race in which he had a pecuniary interest." Nobody can doubt that if this innuendo is proved, the libel is made out. But the mere stating that it is true does not make it so. How does the plaintiff show that this is the meaning? Does not the defendant show that this cannot be the meaning, by showing,

as was stated by my brother BELL, that it is a counter statement of the false effect of an error in the plaintiff's advertisement, which made the stewards decide the race, while one steward and two judges decided it? There is not one particle of imputation on the plaintiff in this case. It never touches him; but if you confound the judge and steward, and make them one party, you may apply to the steward what was intended for the judges, but only by thus twisting can you make out any imputation whatever. [His Lordship then discussed the facts given in evidence, and concluded:] But considering the expressions are not a libel in themselves, and if a libel, not a libel on the plaintiff, I must concur with my learned brother and say judgment for defendant with costs.

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[Plaintiff's Attorneys, J. & H. REID.
Defendant's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

REID AND OTHERS *vs.* CROZIER AND CLOETE.

Attachment of ship ad fundandam jurisdictionem.—*Action to rank as preferent a claim for the price of provisions supplied to a ship whilst under attachment.*

A vessel in harbour was attached ad fundandam jurisdictionem *at the suit of C., a creditor of the owner. While under attachment the plaintiffs, at the Captain's request, supplied the crew with provisions. The ship was sold in execution of the judgment in the above suit: the plaintiffs claimed to be paid out of the proceeds, in preference to the claim of C.* Held, *that their claim was not preferent.*

On attachment of a ship, the ship is wholly in the custody of the Court: the Sheriff has entire control, and the contract between Master and seamen is dissolved. [*Per* WYLDE, C.J.]

In this case the declaration stated that on December 11th, 1851, a vessel at anchor in Algoa Bay called the *Charles Molloy* was arrested *ad fundandam jurisdictionem* in the suit of *Crozier Brothers* vs. *T. Browne*, Browne being the owner of the ship. That while the ship was at anchor and under attachment by order of the Supreme Court—to wit, from December 15th, 1851, to June 30th, 1853—the plaintiffs,

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who at that time carried on the business of butchers and greengrocers at Port Elizabeth, at the instance and request of the Master, supplied to the ship for behoof of the crew, meat, vegetables, &c., to the amount of £150 6*s.* 3*d.* That the ship, by an order of Court dated June 14th, 1853, was condemned to be sold in execution of the judgment of the Court in the suit of *Crozier* vs. *Browne*,* and the ship was accordingly sold by the Sheriff on July 23rd, 1853, the proceeds of the sale being in the hands of the Sheriff: that although the plaintiffs are by law entitled to a preference out of the nett proceeds of the said ship or vessel, for the amount of the provisions and other articles as aforesaid supplied to the crew, the defendants, Crozier Brothers, have claimed to be paid the amount of their debt and costs before them, the plaintiffs, and thereupon the High Sheriff hath refused, though often applied to, and though he hath sufficient funds in his hands for the purpose, to pay the said amount of £150 6*s.* 3*d.* to the plaintiffs. Wherefore the plaintiffs prayed that they might be adjudged to have a preferent right for the sum of £150 6*s.* 3*d.* upon the proceeds in the Sheriff's hands, and that he might be ordered to pay the plaintiffs the sum of £150 6*s.* 3*d.* before paying any sum to Crozier Brothers. The defendants pleaded the general issue, and further that the whole of the purchase-money of the ship in the declaration mentioned, to wit the sum of £1773, is insufficient for the discharge of debts, claims, and demands upon and against the said purchase-money, prior and preferent to the debt, claim, or demand of the plaintiffs, and that the Sheriff had not at any time any moneys whatsoever lawfully applicable to discharge the claim of the plaintiffs or any part thereof.

An account was annexed to the plea shewing the claims alleged to be preferent to the claim of the plaintiffs, and leaving no portion of the sum of £1773 applicable to their claim. The items in this account were:—

	£	*s.*	*d.*
Sheriff's charges in execution	157	13	9
Payments to Captain and Seamen	493	5	3
Deputy Sheriff's and Attorney's charges . . .	517	19	6
Commission charges—anchor and cable, &c. . . .	398	6	3
	1567	4	9

* See p. 5.

In this account, the claim of Messrs. Crozier Brothers for £297 odd with interest and costs was not included: the plaintiffs had obtained judgment for this amount on June 14th, 1853.

THE COURT directed that the High Sheriff Cloete should be absolved from the instance with costs.

An admission paper was put in, to the effect that for the purpose of trying the right of preference on the proceeds realized out of the sale of the *Charles Molloy*, the account for provisions for £150 6*s.* 3*d.* should be taken as proved.

Brand, C. J., (with him *Watermeyer*) for the plaintiffs, contended that by the civil law, which is in these matters the law of the Colony and differs from English law, furnishers of supplies to seamen on board of ship on the order of the captain have not merely a personal claim against the captain, but have a claim against the ship *in specie* in preference. (See *Abbott on Shipping* (5th ed.), pt. 2, c. 3, § 3, p. 109; (8th ed.) p. 142, *et seq.*; *Digest*, 20–4, 5, 6.) Further, that the arrest *ad fundandam jurisdictionem* by which, for the purpose of seeing that the ship was not removed out of the jurisdiction, but for no other purpose, the Sheriff had attached the ship in harbour at Algoa Bay, created no change in the duties of the captain regarding the safety of the ship. He was still bound to see to its repairs, provide the crew with necessaries, be prepared for a continuance of his voyage immediately the arrest should be taken off the ship. For all these purposes the ship was answerable in preference to debts like that of defendants, which were against the owners personally. From the plea it appeared that sailors had been paid wages in preference, and yet the claim for food by which these sailors were to live was disputed as being a personal claim on the master. The plaintiffs were entitled to judgment unless, contrary to the principles and effect of an arrest *jurisdictionis fundandæ causâ*, it were maintained that the owner and captain were immediately divested of all power or care for the safety of their own ship and crew during such arrest. If the attachment had lasted for a day or a week, there could be no question of a preference for such short period. The length of time occupied in the proceedings in *Crozier* vs. *Browne* made no difference in the principle. The captain and crew

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must be considered as part of the ship, and the same principle must apply as in the case of repairs to a ship. The owners have every right over the ship still except as to her removal, and are certainly not absolutely divested.

Porter, A.G., for the defendants was not called upon.

WYLDE, C.J., said:—By the arrest the ship is wholly in the custody of the Court. Immediately upon the Sheriff's taking possession there is an entire dispossession of the owner, the captain and all who before had possession of the ship. The captain has no more control. The contract with the sailors is dissolved. It is for the Sheriff to see to the safety of the ship, to provide seamen if necessary for safety, while the ship is in his custody,—to obtain supplies for such seamen. The Sheriff being under control of the Court, if he did not properly attend to the safety of the ship in his custody, he could, on the application of those interested, be ordered to provide what was necessary for the ship's safety. The custody in which the Sheriff was ordered to take the ship by the Court vested the ship entirely in the Sheriff and divested every other person. The captain therefore had no power to order these supplies of provisions for the behoof of the sailors. The sailors had ceased to be seamen of the ship. The payment of these seamen and the captain by the Sheriff, which may have been a wrongful act, does not give the plaintiffs a right to claim to be wrongfully paid. The owners and Crozier Brothers may both be entitled to complain of such wrongful appropriation of money belonging to them or either of them. The Sheriff's duty in execution was to pay Crozier Brothers the amount awarded to them by the Court and not to constitute himself a judge of other claims. There must be absolution from the instance with costs.

BELL, J.:—I do not go the length of concurring with the Chief Justice that the ship is so entirely vested by the arrest in the Sheriff as altogether to divest every other person, but I agree in the conclusion that the plaintiffs' claim should not be upheld. The matter to be looked to is the use of the ship during the period of the supply of provisions for which this right of preference is claimed by the plaintiff. This right of preference is not given to those who supply a ship because it is a ship,—but only when it is used as a ship, and

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the supplies are made on a voyage or for the immediate purposes of a voyage. No hardship can be complained of here. The plaintiffs knew that the ship had been arrested, and therefore was not performing the functions of a ship. Although therefore the civil law gave a preference to those who supply ships with provisions necessary for the completion of a voyage, the authorities quoted do not apply to the case of an arrest in harbour, as in the present instance.

EBDEN, J.:—I concur; although there are cases in which I should be of opinion that a preference can be claimed by parties supplying provisions to the crew, even after an arrest, this is not one of those cases.

Absolution from the instance with costs.

[Plaintiffs' Attorneys, J. H. HOFMEYR.
Defendants' Attorneys, J. & H. REID.]

MILLS, EXECUTOR OF ANDERSON, *vs.* THWAITS.

Will.—Letters of administration.—Institution of heirs.—Exception of non-qualification.

The plaintiff was appointed executor under the will of A. and took out letters of administration; as executor he sued defendant to compel him to execute certain deeds of conveyance: an exception that the will was invalid on account of the non-institution of heirs and non-disposal of any property, overruled, without deciding on the validity of the will, as being incompetent, whilst the letters of administration were in existence.

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This was an action in which the plaintiff, "as executor testamentary of the late George Anderson," whose will was executed June 14th, 1845, called upon the defendant to execute certain deeds of conveyance relating to property at New South Wales.

The defendant excepted to the declaration, alleging that

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the deed under which letters of administration were granted to the plaintiff by the Master of the Supreme Court was not a valid last will by the law of the Colony as not containing any institution of heirs, and merely appointing the plaintiff executor without any disposal of property, on which ground defendant claimed that the action should be dismissed as incompetent, the plaintiff having no title to sue as executor under such invalid deed.

Watermeyer in support of the exceptions.

There is no will and no letters of administration are grantable, for the document fails in what is the essence of a will, the institution of an heir: see *Voet*, 28, 5, 1, as to "*haeredis institutio.*" Executors cannot act if there is no will, for they are the agents or procurators to wind up the estate of deceased: see *Van der Keessel*, Thes. 323. Executors were unknown in the civil law, the *haeres* did everything. See *Dutch Executors—Practice, by Herbert* (1842), chap. i., pages 11, 16, 17. "Without acceptance of inheritance, no will."

By civil law a man may not be partly testate and partly intestate. All the authorities show or imply that executors are agents for administering the property. This document cannot be valid as a codicil; it is either a testament or nothing. The will disposes of nothing: see *Voet*, 28, 1, 3, as to definition of a will.

Porter, A.G., contrà:—The principle of the exception is non-qualification, because an heir has not been named. But the common forms of wills are without regard to the institution of an heir: times and circumstances must modify the common law. *Herbert's Cases* are not considered law, and the practice is contrary to what is there laid down: see page 20. Executors are not mentioned in the Roman-Dutch authorities, except *Van der Keessel*, who wrote about 1800: in English law the appointment of an executor makes a will. See *Williams on Executors* (3rd ed., p. 136, vol. 1, bk. 2, ch. 3, § 5). As to Scotch law, see *Erskine's Practice*, bk. 3, § 2, p. 169. Ord. 104, §§ 20, 21, should be adhered to it as to its true construction and application: the chief necessity of naming an executor takes place where there are no heirs. Sect. 21 says: "When any person shall have died without having by any *valid deed* appointed any person to be his executor"—the

phrase is not "by will." The present document is certainly a valid deed. *Van der Keessel*, Th. 290, says that at the present day a testament wherein no heir has been instituted is valid; as to the codicillary clause to which he refers, it should be understood, no form or words are necessary for it: see *Voet*, 29, 7, 7. Sect. 26 of Ord. 104 is the same as the English law: and provides that the Court may revoke the letters of administration when the deed is null.

[EBDEN, J.:—Are not the letters of administration to the plaintiff to be set aside, before any one can interfere?]

Watermeyer in reply:— As to the codicillary clause, *Voet* (29, 7, 7) says it must be express. See also *Voet*, 50, 17, 7; *Grotius Introd.* 2, 17, 3. "A testament is that which contains or is intended to contain the institution of the direct heir." An executor is a very different person here and in Scotland. As to the words "valid deed" in § 21, this must be taken as always presupposing a disposal of the property.

[BELL, J., referred to *Voet*, 28, 1, 3, as to a will disposing of property.]

THE COURT, without deciding the question of the validity or invalidity of the will, held that it was incompetent to the defendant to take this objection, as the plaintiff having received letters of administration which are in existence had legal authority to act on behalf of the estate and to give sufficient discharges to all who had dealings with the estate. The question of the validity of the will might be raised by those interested in the succession, but not by the defendant.

Exception overruled with costs.

[Plaintiff's Attorneys, J. & H. REID.
Defendant's Attorney, A. HUTCHINSON.]

VERWEY *vs.* ABO.

Provisional sentence.—Agent.

Provisional sentence granted upon an acknowledgment of debt signed by one J. "for A." the defendant, the summons calling on defendant to deny J.'s signature or his authority to sign, having been personally served on defendant, who did not appear.

1855. Aug. 23. — Verwey vs. Abo.

Provisional sentence was prayed upon an acknowledgment of debt dated Aug. 2, 1853, in the following terms :—

"Borrowed in cash from Mr. E. A. Petersen the sum of 433 rds., to be paid on demand with the usual interest.

"(Signed) C. J. JOOSTE for T. VON ABO."

The document was ceded to plaintiff. The summons called upon defendant to deny the signature of Jooste or his authority to sign. The service upon defendant was personal, and his reply was, "I know nothing about the bill; it has never been presented to me."

Watermeyer for plaintiff referred to *Merula*. Defendant was in default.

THE COURT (WYLDE, C.J., and EBDEN, J.) granted provisional sentence.

[Plaintiff's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

VERWEY *vs.* O'REILLY.

Provisional sentence.

Provisional sentence granted upon a note made payable "at Somerset," without proof of presentment.

1855. Aug. 23. — Verwey vs. O'Reilly.

Provisional sentence was prayed upon the following promissory note :—

"£100. Stormberg Spruit, December, 1854.

"Six months after date I promise to pay to Mr. Jan Mare or order the sum of £100 for value received in sheep payable at Somerset.

"(Signed) A. A. O'REILLY."

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There was an endorsement to plaintiff.

The defendant was described in the summons "as of Burghersdorp."

The service was made at defendant's residence and a copy of the summons was left with his wife, as defendant was from home.

Watermeyer for plaintiff. Defendant in default.

THE COURT (WYLDE, C.J., and EBDEN, J.) granted provisional sentence without proof of presentment, holding that the words "at Somerset" were too general.

[Plaintiff's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

PIKE *vs.* HAMILTON, ROSS & Co.

Party-wall.—Encroachment.—Servitus luminum.—Obstruction of light.

Defendant built upon the whole of a party-wall owned by him and plaintiff, and projected a roof over portion of plaintiff's property without his consent. He was ordered to remove the encroachment, as he was only entitled to cover one half of the breadth of the wall.

Rights and duties of owners of a party-wall discussed.

Right of obstruction of neighbour's lights, and duty as to giving notice of objection to obstruction.

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This was an action to compel the defendants to remove a certain wall which was an obstruction to plaintiff's light, and for damages. The declaration stated that the plaintiff was the owner of a house and premises at the corner of St. George's and Castle Streets: that the defendants owned a store fronting the Harengracht: that the rear of plaintiff's and the rear of defendants' premises nearly meet, that the premises are divided partly by a common or party-wall belonging to plaintiff and defendants in equal shares, and partly by a wall which is built upon and is part of plaintiff's premises, or if not, is also a party-wall. That about

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June 19th, 1854, and subsequently, defendants wrongfully and without plaintiff's consent, so placed and constructed the roof of a certain building of theirs in course of construction that the roof rests upon both the walls and covers the whole of the top and projects beyond the walls, overhanging the plaintiff's premises, several inches. Further, that whereas the plaintiff has of right as owner of his property a servitude upon defendants' premises constituted by grant dated Aug. 27, 1818, made by S. Van Reenen, then owner of defendants' premises, in favour of F. Munnik, then owner of plaintiff's premises, the defendants are bound not to obstruct or darken two windows inserted in the last-mentioned wall; that the defendants have lately built up certain walls on their premises near to the said windows so as to obstruct and darken them: that plaintiff has frequently requested defendants to remove the roof from the walls or to place the roof in such manner as it shall not project beyond the wall which plaintiff admits to be a party-wall, or extend further at most than one half the breadth of the top of the said wall, and that he has requested defendants to remove the roof from off the plaintiff's wall, and to remove the walls by which they have obstructed plaintiff's windows, but that defendants have refused. Wherefore the plaintiff prayed that the defendants might be condemned to remove the roof resting upon and projecting beyond the party-wall, and the roof resting on the plaintiff's wall, wholly and entirely, so that the walls may be restored to their former condition; or in case the Court should be of opinion that the defendants are by law entitled to recover one half of the breadth of the party-wall, then that they may be condemned to remove the roof so as not to cover more than one half of the breadth of the wall measuring from their own side, and to remove the roof from off plaintiff's wall, and to remove so many or so much of the walls as obstruct and darken plaintiff's windows and pay £100 damages, or that plaintiff may have other relief, with costs.

The defendants pleaded:—1st. General issue.

2nd. That admitting they had erected a roof the top whereof projects beyond the wall of the roof so as to overhang plaintiff's premises, yet they are by law and by right of servitude entitled to construct such overhanging to the extent now done and complained of.

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In June, 1854, application was made by plaintiff before BELL, J., for an interdict to restrain defendants from proceeding with the portions of their building alleged to be encroachments, until the issue of a suit to be brought by plaintiff, but the application was refused "in respect that the operations complained of are all but completed," so that the prejudice if any cannot be repaired by interdict asked, without prejudice to complainant's right of action.

For the plaintiff the following evidence was given:—

Mr. Munnik, who became in 1816 the proprietor of plaintiff's property, proved that the wall referred to in the declaration as a party-wall had been for at least the last forty years considered a party-wall. Mr. Van Reenen, son of S. Van Reenen, who owned the defendants' property in 1818, gave similar evidence. Nothing at that time rested on the wall; but it was repaired and plastered on each side by the respective proprietors. The title deed of plaintiff's predecessor, Storm, dated December 10, 1765, contained a condition "that the wall separating the two properties should be a party-wall" (gemeene muur). There was nothing of this nature in defendant's title. The claim for removal of the wall alleged to obstruct the light in plaintiff's windows rested on the following servitude on the defendants' title granted in 1821 by defendants' predecessor:—

"I, the undersigned, S. V. Van Reenen, sen., declare by these presents not only to have granted permission to my son-in-law, S. F. Munnik, to place two windows in the wall of his store adjoining my back yard, but bind myself also, as long as I am proprietor of my house, not to obstruct these lights in any manner; and, further, solemnly promise and undertake that in case I sell my house, that mention of this shall be made in the transfer; and it shall be made known to all future proprietors that this is a servitude, to be binding for ever.

"I make the above concession to my aforesaid son-in-law provided he properly secures the two windows with iron rails, and for the above bind my person and property according to law.

"(Signed) S. VAN REENEN.

"Cape Town, August 27, 1821."

Opposite these windows the wall had been considerably heightened, and it was alleged that thereby the light was obstructed.

For the defence was called M. Ruysch and J. Kennedy, surveyors, who stated that by measurement the plaintiff's property, acccording to his title, did not extend further than

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from St. George's Street to fourteen inches within the line of wall claimed as a party-wall, commencing from Castle Street; that by measurement this wall stood for the most part upon defendants' property, and for some part upon what by the diagrams was an intervening space of seventeen inches on the Castle Street side, and nine inches on the further side, between the two properties; but that no part of it at all stood on the plaintiff's ground, according to the diagram annexed to his title. Ruysch expressed his opinion that the party-wall spoken of in the title of 1765 was one in a line with that stated to have been built by Munnik inside what the plaintiff alleged was the party-wall.

The party-wall in question commenced from Castle Street, parallel to St. George's Street, and ran in a straight line for several feet to about half the width of plaintiff's property. Here immediately within the alleged party-wall there was an inner wall, stated by Munnik to have been built by him in 1816, when making alterations, and intended as a wall of a kitchen. This wall was apparently continued to the further limit of plaintiff's property, or was in a line with the wall at the further limit dividing the two properties. The defendants, in making the alteration complained of, had placed their roof so as to project several inches over the alleged party-wall, and had raised the inner wall some feet in like manner, resting the roof on and projecting over this wall.

The transfer of plaintiff's property to Storm was of date December 10, 1765. Storm's executors transferred to C. A. Storm, May 10, 1811; his representatives transferred to T. F. Munnik, April 26, 1815; and the transfer from Munnik to plaintiff was December 12, 1837; all under the like conditions. The first transfer of defendants' premises appeared to be from Hemming to Cruywagen, December 17, 1779.

Munnik stated that he had seen the windows lately, and could not see much difference as to the light.

Watermeyer (with him *Porter, A.G.*) contended that the use of the premises as proved by the evidence would override the diagrams, which are not meant to fix to inches; it could not be intended that there was to be a neutral space between the properties. As to the rights of parties to a party-wall, see *Voet*, 8—2—16, 17; *Grotius, Introd.* 2—34—3, 4.

Further, by the servitude put in, the defendant was bound not to obstruct the lights—this refers to natural light only.

Brand, C.J.:—The plaintiffs have no claim to any excess of ground beyond the grant. According to the diagrams the plaintiff has built a wall on ground not his; but supposing the wall to be a party-wall the defendants are still justified. See *Pothier on Partnership*, § 140, and *Grotius*, 2, 34, 4, note.

As to the alleged obstruction of the light, see *Burge*, vol. iii. p. 403; *Voet*, 8, 2, 11.

As to what is meant by obstructing, see *Voet*, 8, 2, 17, "Quod si cum ad medietatem usque liceret, &c."

2 *Harrison, Digest*, p. 1453.

The only right plaintiff can have is the right to a window: see *Voet*, 8, 2, 7; *Grotius*, 2, 34, 22; *Institutes*, bk. 2, tit. 3, par. 1.

Watermeyer in reply. *Voet* and *Grotius* do not uphold *Pothier* as to the building up of a common wall. See *Voet*, 8, 2, 9, as to *Servitus Luminum*.

Cur. adv. vult.

Posteà (Aug. 30),—

WYLDE, C.J., in giving judgment, said:—This case has been long under the consideration of the Court, and I regret that I cannot now lay my hands on the notes I had made for judgment. But the circumstances are so clear that I am nevertheless enabled at once to proceed to judgment in the case. The prayer of the declaration is that the defendants shall be ordered to remove certain buildings and encroachments. The plea to this is that "admitting that they had erected a roof, the top whereof projects beyond the wall of the roof so as to overhang the premises of the plaintiff, yet the defendants say that they are by law and by right of servitude entitled to construct such overhanging to the extent now done and complained of." The Court thought it advisable to take a view of the premises, and certainly the buildings gave such strong evidence that it was impossible to come to any other conclusion than that the buildings of defendants did overhang and encroach upon the premises of the plaintiff. Upon that view, seeing what would be the necessary consequence of the plaintiff's obtaining a judgment,

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the Court were extremely desirous that the parties should parley and come to an arrangement for their own interests, and that in respect of the encroachment, which the Court could not but say had been made, the Court might be spared a judgment. This, however, had no effect, and the question must be decided, does the building of defendants overhang and encroach upon plaintiff's premises? And that such is the fact, there can be in my mind no doubt. Doubt was sought to be thrown on the party-wall, and the surveyors suggested to the Court from measurement, that the wall in question was not in fact the division or party-wall between the two adjoining tenements. Now this has not been shewn to the satisfaction of the Court, and I think it would be unjust to the parties that any other division line should be taken than that wall, which was treated and repaired by both as a party-wall—as is in proof—for the last forty years. It is true that a fine building has been erected and a useful one as far as regards the defendants; but their defence that they had a right to do this over the plaintiff's premises has failed. This is the only fact in the case; and the sole question that remains is, how is the encroachment to be reduced? The plaintiff claims that the encroachment be taken off the party-wall entirely; but if, according to law, that cannot be done, then, that, to the extent of one half, the party-wall be left free. There was much argument on this point, but it has been shewn to be settled law that each party may use to the extent of one half, and then only, if the wall be not too weak to support what is raised on the half, so as to cause no injury to the neighbour. This is a fixed principle, and a safe one. *Voet, Van Leeuwen* and all the authorities agree that to the extent of one half only, when his neighbour is not thereby prejudiced, can either of the parties use such a wall. Here the judgment of the Court must be that the encroachments be reduced and that the defendants had no right to go beyond their own half of the party-wall. This judgment may be drawn up by the parties themselves, so that their position may be clearly understood according to the principles laid down by the Court. With regard to the light no sufficient damage has been proved, and indeed the question seemed to be almost given up at the bar. With reference to this, too, one remark may be made. Earlier notice should have been given to the defendants, if it were anticipated

that the building of that wall would obstruct the light. Sufficiently early notice was not given with respect to this part of the case—even were there obstruction—and on this defendants are entitled to absolution from the instance. The Court gives no judgment at all on the measurement, but decrees that within a certain time the encroachment be reduced, there being no doubt at all what, in justice to the parties, is the dividing or partition wall between them. No damages are given, because, the encroachment being reduced, no damage will be suffered. With regard to costs, the plaintiff must certainly have his costs.

BELL, J., said:—I do not think it necessary to say much in this case, because there is no dispute as to the law. It is admitted that if the wall in question be ascertained to be a party-wall, the use of the wall belongs to either party to the half, if thereby no prejudice is occasioned to the other side, by reason of the inability of the wall to support the weight put upon it. This is not denied on either side of the bar. But it is argued for the defendants, on the allegation of the surveyors, that there is an intervening space between the two properties, a *terra nullius*, and that the defendants had a right to appropriate this to themselves. This would be entirely opposed to the mention of a party-wall in the plaintiff's title of 1765. The transfer is said to be under the express condition "that the party-wall between the two properties shall be common." Now this is not obligatory on the defendants, but it raises a sufficiently strong presumption in my mind, that the fact was stated, and that a party-wall existed. In addition to this, the evidence adduced that the wall, beginning from Castle Street, has been for a long series of years used by the proprietors on both sides, leaves no doubt in my mind that it is the very wall mentioned in the deed of 1765. I therefore start from Castle Street, where the division between the two properties commences. But this wall ends at the arch in Ross & Co.'s store, and then the inner wall commences, which was built by Munnik. Now the defendants have no right to any part of that wall, and they are asked by the declaration to remove their roof entirely from resting on any portion of that wall. The plaintiff might have gone further, and have claimed that they should retreat their roof entirely to a line corresponding

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with the middle line of the party-wall; but he has not done this. The Court therefore must decree, that with reference to what is clearly the party-wall, the roof, &c., be withdrawn to the half, and that the encroachments be taken entirely from the wall which stands wholly on the plaintiff's property. With regard to the alleged obstruction of the lights, the question, as has been observed, was nearly given up at the bar. And, indeed, it would be a great hardship, no early notice having been given, to entertain any claim for the removal of the wall built opposite these windows. No obstruction has been proved, and I agree with the Chief Justice that there should be an absolution as regards this prayer.

EBDEN, J.:—It seems to me that, in this case, the first point I have to decide is, whether the wall in question be a common or party-wall. The principle of law appears to be that "the wall or vacant space between two adjacent houses, in the absence of clear proof that it is the sole and separate property of one, is presumed to be the common property of both the proprietors of the adjacent houses."

Burge, for this, quotes as authorities the *Digest* and the *Institutes,* as well as *Voet,* 8, 2, 15, who there says, "In the first place it must be known that an intermediate wall between two houses or gardens in case of any doubt is presumed to be common so often as the indications and proofs are wanting of the full ownership of either one or other neighbour. And the same thing has been established concerning a wooden hedge and vacant space between two houses and all other things that are intermediate between two neighbouring farms, if they are not proved to be the property of one." That a similar principle prevails in England may be gathered from the two cases cited in *Roscoe's Nisi Prius Evidence* (8th ed.), pp. 560, "If two tenants in severalty build a party-wall, one half of the thickness of which is contributed by each under the London Building Act, 14 Geo. III. c. 78, the wall ensues the nature of the land, and the owners of the land are not tenants in common of the walls: *Watts* vs. *Hawkins,* 5 Taunt. p. 20. But in a case to which the London Building Act does not apply, the common use of a wall separating adjoining lands, belonging to different owners is *primâ facie* evidence that

the wall and the land on which it stands belong to the owners of the adjoining lands in equal moieties as tenants in common: *Cubitt* vs. *Porter*, 8 B. & C., p. 257." Without the aid of this presumption of law in favour of the plaintiff, it has been most satisfactorily proved by the evidence of Mr. Munnik, the former proprietor of the premises of the plaintiff, and of Mr. Sebastian van Reenen, the son of the previous owner of the defendants' property, that the said wall has been treated and considered by the respective proprietors of both premises as a common wall, and a personal inspection of the wall corroborates, in my opinion, their testimony.

I cannot see, therefore, how, under the circumstances proved, I can hold any other wall but this to be the party-wall mentioned in one of the title deeds of the plaintiff, the transfer to Storm dated December 10, 1765, and to which wall the express condition "that the party-wall between this erf and Mr. Henning shall be common," which is contained in the said transfer and referred to in the subsequent transfers, must be taken to apply. I dismiss that part of the evidence of the surveyors, Messrs. Ruysch and Kennedy, which makes this wall stand on a slip of seventeen inches wide of neutral territory or nobody's ground. Assuming that the surveyors are right in their measurement, according to diagram, which in practice is sometimes found erroneous, I consider that, as between the plaintiff and defendants, the established use of the wall as a common wall for forty years by both their predecessors, through whom they respectively claim, ought to settle this point. The wall having been held to be a common wall, the question then arises, Have the defendants made an illegal use of the said wall? The principle of law which seems consistent with reason and conscience is stated by *Burge*, vol. iii. p. 407, to be that "the common proprietors of the wall, whilst each is permitted to use it in a manner consistent with the purposes to which it was destined, are at the same time restrained from making that use of it which might be prejudicial to either building unless with their mutual consent." See *Voet*, 8, 2, 16: "A wall placed between the boundary by either one or the other of two neighbours is thereby common, and each may, in place of a common enclosure, make a wall, but not an enclosure instead of the wall, except for a short time for the purpose of repairing the wall. No one may make a window

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through a common wall, or any opening without the common consent, neither may he attach any oven thereto, or sewer, or anything which can injure the common wall": *Grotius*, 2, 34, 5. It does not appear inconsistent with this principle that, provided the wall be strong enough, or as Voet expresses it, "the half part of the wall is able to bear the burden," each neighbour may build on a common wall, but only to the half: *Voet*, 8, 2, 17; *Grotius*, 2, 34, 4. Again, "For, according to common right, no one may erect any building upon the wall of another, and not even upon a common partition-wall, excepting upon the half thereof, provided such wall be so thick that one half of it can support a building, because in such a case the party is understood to build not so much upon another's as upon his own ground. But if the wall be not so thick, as is often the case with us, that one half of it will support any building, such erection cannot be made upon a common wall without general consent, otherwise such building will also be liable to community to such extent: *Van Leeuwen's Commentaries*, 2, 20, 3. Now in this case it has been proved that the defendants, without the consent of the plaintiff, and after notice to desist from so doing, have *monopolized* the *whole* of the common wall by building upon it, and have also built upon the plaintiff's own wall, situated on the plaintiff's own premises within the said common wall, as well as projected a portion of their roof over the plaintiff's property. These are clearly illegal encroachments, which I think the Court are bound in law to order to be removed, according to the prayer of the plaintiff's declaration applicable thereto. With respect to the question as to the servitude of the light, I do not feel myself called upon to give any decision on the legal principles involved in the able arguments of counsel on this point, for if the plaintiff did not virtually at the trial give up this part of the case, I consider that he has at least failed in establishing, by evidence, to my satisfaction, that the light has been obstructed. I think, therefore, with respect to this part of the case, the defendants should be absolved from the instance. I do not think it a case for damages, for if the obstruction be removed, the plaintiff will have suffered no damage.

[Plaintiff's Attorney, A. HUTCHINSON.
Defendants' Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

RE MONTEFIORE.—[*In Camerâ.*]

Arrest.—Rule of Court.—Law of Mandate discussed.

Where there was clear evidence of a debt without security, and of an intention to flee, and there was no palpable obvious irregularity apparent on the face of the writ of arrest, application for the discharge of the writ refused, without entering into further merits of the question. [*Per* BELL, J.]

1855. Oct. 13. *In re* Montefiore.

Application was made to BELL, J., for the release of Montefiore, who had been arrested at the instance of the Cape of Good Hope Bank.

The affidavit on which the writ of arrest was granted was made by T. E. Jones, cashier of the Bank, and stated that Montefiore was indebted to the plaintiffs in the sum of £1855 with interest; for which debt no security had been given, and that defendant was about to leave the Colony in the *Owen Glendower* without satisfying the debt or giving security.

Other affidavits on both sides were filed in the case, and it was alleged for defendant that the money was advanced to him under a letter of credit to the Bank, which letter, however, was in form a letter of introduction.

Brand for the applicant contended in the first place that the arrest was illegal *ab initio:* the writ was illegal, and if it was not now disallowed, defendant had no action against the Bank because persons not properly authorised had taken out an arrest. It was clear that no person, not in a position to bring an action, can take out an arrest: if the Bank determined to bring an action, proceedings must be taken under the power given in the trust deed. The trust deed says the directors shall elect three trustees who shall bring all actions in their name on the part of the Bank: this they can only do upon being authorised and directed to that effect by the directors for the time being: there was no proof here whatever, even supposing that the trustees were trustees, that they were so authorised and directed: therefore the arrest is null *ab initio.* If the trustees had brought an action before

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the Supreme Court for debt they would have been obliged to prove the resolution of the directors.

[BELL, J.:—Is not the burthen of proof upon you?]

The liberty of the subject is in danger: I may be arrested, thrown into gaol, no power produced, although I am in gaol for fourteen days. No Judge ought to grant an arrest unless the power is produced: if they do not produce the authority, they procure the arrest at their own risk.

[BELL, J.:—Your client appeared by agent, and therefore it must be supposed that he has assented to their having applied: you passed from that objection at the time this warrant was issued: no such objection was then taken.]

Everything should be weighed with a feather when the liberty of the subject is to be considered. There is a second objection. The trust deed appoints three trustees who are to represent the Bank in all matters: the trust deed is their power of attorney. Insolvency puts an end to a trust, and of the three trustees two are insolvent, so that only one, if he had authority from the directors, would be the party to represent them.

[BELL, J.:—Where is your authority that insolvency destroys a trust?]

All the world knows that they are insolvent, and this Court has many times decided that insolvency puts an end to a power of attorney, as death does. A person giving such a trust to another considers him a man fit to take care of his business, but the moment insolvency occurs, it disables him from doing so. Suppose Montefiore had been imprisoned fourteen days and was then discharged, against whom could an action be brought? Suppose the Bank disclaim the power of attorney and say they have not given the trustees authority. We go to them and knock at the doors of two insolvents who cannot pay—arrests are odious, they are executions beginning, instead of actions beginning; they have been introduced, so that a debtor, about running away, shall not leave his creditor a loser, but these are steps only to be taken in extreme moments, and even in case of a debt, if the fear of escape arose before the debt was contracted, the Judge will not hear of granting an arrest. As to the extinction of a trust by insolvency, see *Voet de Procuratoribus*, 3, 3, 21: *De Mandato*, 17, 1, 16. By the Civil Law death may be civil or natural, and *Voet* refers to both in these sections.

There is a further point. By insolvency a person loses his *persona standi in judicio.*

[BELL, J.:—That is a mistake, I think. An insolvent can have his reward for labour done, and can invest that for his own benefit.]

He cannot do that without the assistance of his trustees.

[BELL, J.:—Yes, he can do it in his own right.]

I can show that he may not without trustees.

[BELL, J., referred to Ord. 6, 1843, § 49: "Nothing shall prevent an insolvent from receiving, suing for," &c.]

That is a personal power only, this is a power to act for others.

I now come to another point: the insolvency of a guardian destroys the guardianship.

[BELL, J.:—That must be shown, for it is not law in every part of the world: if it is law here, it is new to me.]

(The learned counsel then proceeded to discuss the validity of the arrest on the merits, and contended that the nature of the transaction between the Bank and Montefiore, as disclosed by the affidavits, was not one of mere simple lending and advance, but an advance made on the credit of a draft to England; further, that there was no intention to leave the Colony.)

By Ord. 105, 1833, § 17, it is provided that guardianship ceases by insolvency.

[BELL, J.:—That is a special enactment, and if it goes for anything, it is against you.]

As to a mandate ceasing by insolvency, see *Voet*, 17, 1, 17. According to the trust deed of the Bank, the trustees must be shareholders, and they are partners.

Mr. Attorney Reid appeared on behalf of the Bank.

BELL, J., said:—I do not intend to decide on the objections which have been taken, which involve questions of law requiring investigation, neither do I intend to hear the other party. It is not necessary in an application of this kind, to see that it can be supported in all respects, to do all that would be required before the Court in support of this action. There will be opportunity for taking these objections at a subsequent stage. All that a Judge requires to do is to be satisfied that the party obtaining the warrant has *primâ facie* a *bonâ fide* case, to enquire whether there

1855. Oct. 13. — *In re* Montefiore.

is debt or no debt, security or no security, intention to flee the country or no such intention. Any palpable, obvious irregularity, instantly verified by the proceeding, it would be my duty to attend to; but it would defeat the very object of such proceedings if such speculative questions as have been urged *in limine* required to be decided. I shall dispose of this application upon grounds which are not disputed by either party. Now, there is no dispute as to the fact of there being a debt, or as to no security having been given for it; neither is there any dispute that the debtor did at one time intend to leave the Colony, while the matter was in this state; for, according to his own story, he had taken his passage by the *Owen Glendower*, and he only came on shore when he heard a suspicion was raised as to the validity of the bills he had exhibited. He tells us that he went to Rathfelder's, and I happen to know the fact, as I met him that morning going out in that direction; but it is not sworn what his view was in doing so, nor is it material that it should, for it is quite clear that he, having arranged to sail with the *Owen Glendower*, and gone on board that ship, while as yet, according to his own affidavit, he had not arranged with the Bank how they were to be secured for the money they had given him, whether by taking the bills purporting to be drawn by Baring Brothers, or by taking his own draft in London, must be taken to have intended to flee, whatever his after observation of the probability of proceedings being taken to stop him, may have led him to do. It is not my intention to express any opinion on the bills or on the letters. I sustain this writ entirely on the question established to my satisfaction, so far as it is at present necessary, that there is a debt without any security given for it, and an intention on the part of the debtor to flee. The only dispute is as to the way in which the debt was incurred. On this subject a most improbable story, to say the least, is told by defendant, as to how the Bank agreed to be reimbursed. But I shall take his story to be true, and then what does it amount to? It may be, that the Bank was too eager for business, and viewed the letters, which were merely letters of introduction, as letters of credit, and that they acted upon them as such, but, after they had advanced the money and agreed to take the party's drafts, found out that they were not letters of credit. This story

may be true, nay it may be, that the defendant, being a man of business, innocently enough presented the letters, thinking they amounted to letters of credit, and it may be that the Bank as innocently took them to be such. But I cannot hold that the Bank, having been deluded by defendant (for even in his affidavit he calls them "letters of introduction and credit"), whether innocently or maliciously deluded matters not, was foreclosed, after going to a certain point, from refusing to go further. If the case of the defendant had been that he brought what was veritably a proper letter of credit, as to its form, and that the Bank, after treating the letter as a good letter of credit, and advancing money on it, and after the money had been spent without any anticipation of objection, had turned round and objected to the validity of the letter, I should say that it would require a very pregnant case on the part of the Bank to induce me to issue or support a warrant of arrest in such circumstances; but where the letter on which the money has been advanced is no letter of credit, or anything like one, it may have been either very ingeniously or very innocently expressed to convey a meaning beyond that of mere introduction, but I take it to be nothing more or less than a veritable letter of introduction—where, I say, the money has been advanced on what is merely a letter of introduction, although the Bank may for a time have taken it to be a letter of credit, there is nothing, on the credit of which the Bank could draw, and there can be no doubt that they have no security for the money they have advanced, or, in other words, that the defendant has not given them anything on the strength of which he was honestly entitled to borrow money. I therefore think that this arrest must be sustained; but I recommend that the writ be altered, for in the cursory view I have had of the matter since I came into Court, it seems to me not to be legal. You cannot arrest a man until he pay a debt for which you have not as yet got execution against him, all you can do is to arrest him until he give security to abide the result of any action to be brought against him. Had the practice of the Colony not apparently sanctioned the form of writ adopted, I would have discharged the writ at once on this ground; as it is, I will allow an opportunity to amend it.

1855. Oct. 13.

In re Montefiore.

Brand:—I believe the warrant is in the form prescribed by the rules.

BELL, J.:—My difficulty is, that the party may rest contented with such a warrant, which in form and effect must have all the value of a writ of execution and may never bring an action to try whether there really is a debt or not, and the man may be incarcerated indefinitely.

Brand:—The writ is held to be both a summons and an arrest.

The Registrar stated that such a writ was always considered as the commencement of an illiquid action and that the party could plead to it as to the summons and declaration.

Brand applied for his client's release on giving security, but the learned Judge refused as no notice had been given.

BELL, J.:—It appears that the writ may be legal after all. If it be the commencement of an action, and the practice of the Court be, as has been explained, I am inclined to hold that the warrant is legal, though being to me an entirely novel proceeding, I was led at first to think that it was not legal. I may mention also that I impounded the bills because there was an affidavit that they were believed to be forged, but I do not intend them to be held beyond a reasonable time.

Application refused with costs.

[Attorneys for Respondents, J. & H. REID.]

MEINTJES *vs.* VAN ROOYEN.

Provisional sentence.—Exception of non-qualification.

Defendant was summoned on a provisional claim on a bond passed by him in favour of plaintiff as executrix testamentary in her first husband's estate: the bond bore a cession to plaintiff by B. as executor testamentary in the estate of plaintiff's second husband, to whom she was

married in community of property: the cession was made in part payment of plaintiff's share of the joint estate: the summons was by the plaintiff individually. The Court refused provisional sentence on the ground that plaintiff could only sue as executrix of her first husband's estate: but granted leave to amend the summons on payment of costs of opposition.

1855. Nov. 15

Meintjes *vs.* Van Rooyen.

Provisional sentence was claimed upon a mortgage bond passed by C. J. van Rooyen in favour of D. van Rooyen, as general agent of M. M. Meintjes in her capacity as executrix testamentary of the estate of the late D. W. van Rooyen: the bond was dated July 11, 1849. The bond was ceded to plaintiff by A. Berrangé in his capacity as executor testamentary in the estate of H. A. Meintjes married in community to plaintiff (who was formerly married to D. W. van Rooyen). The cession was described as being made in part payment of the share due to her from the estate of the late H. A. Meintjes, her second husband, and was dated October 1, 1851.

The summons claimed that defendant should pay to plaintiff the sum due upon the bond—no capacity being mentioned in which plaintiff sued.

Brand appeared for plaintiff.

Porter, A.G., for defendant, opposed on the ground that the plaintiff sued in her individual capacity; that if the bond could be ceded at all, it ought to have been ceded by the executrix of Van Rooyen's estate assisted by her second husband: and without such cession, action could only be brought by plaintiff as executrix testamentary in Van Rooyen's estate.

THE COURT allowed the objection of non-qualification with liberty to the plaintiff, on payment of costs, to amend the record by describing the plaintiff in the summons as executrix of Van Rooyen's estate.

Posteà.—THE COURT granted provisional sentence.

[Plaintiff's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

Re Home Eagar & Co.

Insolvency.—Practice.—Election of Trustees.—Ord. 6, 1843, § 40.

At the second meeting of trustees in an insolvent estate no election took place, as no candidates had the requisite majority in number and value. The Master subsequently called a special meeting for the election of trustees on his own authority, and trustees were elected thereat. On application by a creditor, the Court declared the election invalid, and set it aside.

1855. Nov. 19. „ 20. *In re* Home Eagar & Co.

In this insolvent estate the Master made the following report:—

That at a meeting of the above-named insolvents, held before him on October 31, 1855, the greater part of the creditors in number and value then present concurred in electing B. Norden, E. J. Syfret, and J. Stein as joint trustees for the due administration of the said estate, and the said trustees have signed their consent to accept the said trust. That the following objections were lodged by Mr. Miller, a creditor:—

1. To the legality of the proceedings of the meeting on the ground that the regular meeting for the election of trustees as prescribed by Ord. 6, 1843, § 40, having already been held and no trustee elected thereat, the Master was not empowered to convene and hold this special meeting for proceeding anew to the election of trustees.

It appeared that at the second meeting of creditors no trustees were appointed, inasmuch as two sets of trustees were nominated, one set by the majority of the Cape creditors, and the other set by Mr. Miller on behalf of the London creditors. The Master declared no election, and called a special meeting of creditors, for the election of trustees at which Mr. Miller's attorney raised the objection that the Master had no right to call such special meeting, inasmuch as the Ordinance provides that trustees shall be elected at the second meeting.

The Master overruled the objection, holding that he had the right, and proceeded under protest to elect trustees.

There were further objections, but the Court did not decide upon them.

1855. Nov. 19. " 20.

In re Home, Eagar & Co.

Brand, for Miller, moved for an order of Court with reference to the election.

Porter, A.G., appeared for the trustees to support the election.

THE COURT granted the motion and gave effect to the first objection on the ground that the regular meeting for the election of trustees as prescribed by Ord. 6, 1843, having taken place and no trustee elected thereat, the Master was not empowered under the Ordinance to hold this special meeting for proceeding anew with the election of trustees; and, therefore, without deciding on the other objections, declared the meeting of October 31 and the election of trustees invalid and irregular, and ordered the same to be set aside.

[Applicant's Attorney, A. HUTCHINSON.
Trustees' Attorneys, J. & H. REID.]

BLACKBURN *vs.* KROHN.

Interdict.—Dissolution of partnership.—Powers of receiver.

As to right of a receiver, appointed to one branch of a partnership business upon dissolution of the partnership, to remit moneys to the member of the second branch of the partnership against the will of the member of the third branch. [*No decision, Court being equally divided.*]

1855. Nov. 22.

Blackburn *vs.* Krohn.

This was an application to make absolute an interdict granted in August under the following circumstances:—

Three firms in London, Graham's Town, and Cape Town consisted of the same partners: Henry Maynard, who conducted the London firm; Charles Maynard, who conducted the Graham's Town firm; and Joseph Blackburn, who conducted the Cape Town firm. These firms were all dissolved on December 31, 1850, and the following intimation of the dissolution appeared in the *Gazette* of January 9, 1851:—

"DISSOLUTION OF PARTNERSHIP.

"Notice is hereby given that the partnership existing between the undersigned has this day been dissolved by mutual consent. All debts due to the respective firms may be paid, and all claims sent for adjustment, to either of the undersigned.

1855. Nov. 22.

Blackburn vs. Krohn.

"Mr. Nicholas Peter Krohn is duly authorized to receive and pay all accounts referring to the Graham's Town Branch.

"(Signed) CHARLES MAYNARD, HENRY MAYNARD } trading in London as Maynard Bros. & Co.

CHARLES MAYNARD { trading in Graham's Town as C. & H. Maynard & Co.

J. BLACKBURN { trading in Cape Town as J. BLACKBURN.

"Graham's Town, December 31, 1850."

Shortly after the date of this advertisement, C. Maynard left the Colony for England. Krohn, under the power communicated by the advertisement, received the debts owing to the Graham's Town Company, and paid the debts due by it, and from time to time remitted moneys direct to the London house. This continued till last August, when Blackburn required Krohn not to remit any further moneys to London, but to retain whatever he might henceforth receive till he, Blackburn, should have adjusted accounts with the two Maynards. Krohn refused to comply with this, and on August 23 Blackburn obtained a rule *nisi*, to operate as an interdict, from the Court, restraining him from making further remittances until further order should be made. This was obtained upon an affidavit by Blackburn, which among other things stated that Krohn had continued to remit up to the present time to the said H. & C. Maynard all money collected by him on account of the Graham's Town firm.

Brand, for applicant, applied for the interdict to be made perpetual on the ground that Krohn had no authority but what he derived from the advertisement, and that did not entitle him to exercise any control over such moneys of the Graham's Town firm as might remain in his hands after payment of its debts.

Porter, A.G., for Krohn, argued that the advertisement, coupled with Blackburn's affidavit, shewed that the nature of Krohn's appointment was under a joint agreement by the three partners that Krohn should remit the moneys received by him to London: that the Graham's Town firm was indebted to the London firm in about £4000 for goods shipped by the London to the Graham's Town house: that the application by Blackburn was merely an attempt to

settle the account between the firms within the Colony instead of going to London. Where was the proper *forum* in which the debt due to the London house should be adjusted? That, to do this, Blackburn was not entitled to rescind the arrangement made by the three partners, which could only be done by the unanimous consent of all three. It was Krohn's duty, therefore, to continue remitting the moneys to London, and Blackburn was not entitled to interfere. In the case of *Still* vs. *Norton & Co.*, where there were several companies composed of the same parties, as in this case, it was decided that a partner of the Cape house was not entitled to stop the funds of the Graham's Town firm *in transitu.*

Brand, in reply.

CLOETE, J.:—I entertain no doubt in my mind that the interdict must be recalled, both on the facts of the case and on the principles of our Roman-Dutch Law. See *Van der Linden,* p. 440, who sets forth that to entitle a party to such an interdict three things must concur. 1st: A clear right on the part of the complainant. 2nd: A thing actually done by the party to be restrained, prejudicial to the right, or a well-grounded apprehension of such an act. 3rd: The absence of any other remedy. Now what evidence have we of any right in Blackburn? He says there is a debt of £400 owing to him, but we have no evidence of that except his own affidavit, nor have we the books of the firm to show how that may be; and on the other hand we have nothing to rebut the oath of Krohn that £4000 is owing by the Graham's Town firm to the London one, notwithstanding the remittances already made, and we have Blackburn's own admission that he did not interfere to prevent these remittances during all the period since 1851. It is not asserted that there has been anything like misconduct on the part of Krohn, but, as has been admitted at the bar, the object is merely to render it more facile for the applicant, to have the *forum* here. But I have here an important question to ask myself conscientiously to answer—how are we to grant an interdict without hearing the adverse party? Who is the adverse party? Not Mr. Krohn. The parties against whom the interdict is applied for are the two other partners in England—and is this to be done behind their

1855. Nov. 22. — Blackburn vs. Krohn.

back? Mr. Krohn does not himself know the position of the Graham's Town firm. I have therefore not the slightest doubt. I regret my learned brother has expressed his intention to differ from me—but I feel bound to say, that I have not, first, that clear liquid proof of the debt, which could authorise an application for such an interdict. Secondly, I have not before me a single fact against Krohn shewing that by his neglect or in any other way the complainant can apprehend irremediable injury. And, thirdly, we have not the parties here. Krohn is no party; he is merely what is called in England a garnishee—the holder of the money—indeed, I am surprised he has taken the trouble to come here. The Maynards are the true parties, and there is no one to represent them, nor any notice given to them.

BELL, J.:—I am sorry to be obliged to differ from all that has been said—except in the surprise expressed that Krohn should have come here. The three companies, though dissolved as to future transactions, subsisted for the purpose of being wound up. There was nothing in the terms of Krohn's appointment, by the three partners jointly, which interfered with Blackburn's right in this respect. The advertisement—the only evidence in writing of the arrangement between the partners, or of Krohn's power—said that the debts of the firm might be paid to any of the three partners, Blackburn included; but the subsequent paragraph added that debts owing to and due by the Graham's Town firm might be paid to Krohn. This was due, apparently, in contemplation of C. Maynard, the only partner resident at Graham's Town, going to London, which he soon afterwards did, and to provide for the inconvenience of no partner being resident at Graham's Town. This notice as to Krohn had no reference to anything between the partners. It was intended merely for those who had dealt with the firm, to tell them that they were in safety to settle with Krohn, and it made Krohn no better than one of the common collectors of accounts, except that he was empowered to pay debts as well as to receive them. Blackburn's affidavit as to the remittances to London did not, as argued, give any evidence of a larger power in Krohn than the advertisement itself shewed; it merely established as a fact that this agent of Blackburn and his co-partners had been allowed by him to remit money

to the co-partners. If then Krohn had no larger power than the advertisement gave him, all that *it* gave him was a right to receive the debts due by, and to pay the debts due to, the Graham's Town firm, and to keep any balance of money received over money paid, until told by the partners what he was to do with it. In place of this, he assumes to himself the right of judging between the partners—this mere agent of one of the firms assumes to himself a greater title and a better right than a partner of all the three firms. I don't know why Blackburn thought it necessary to apply to the Court at all. He was entitled—and he is still entitled, for aught I see, notwithstanding what has passed here—to write Krohn a letter, desiring him to remit to him the balances remaining in his hands, otherwise he would prosecute him by action before this Court. Blackburn, however, has chosen a course much below what he was entitled to adopt, and it is strange that that should have been turned against him. He asks only that Krohn should be restrained from remitting money out of the Colony. There can be no doubt in my mind that Blackburn has a clear right to ask more than that; that Krohn is insisting on being allowed to do an act which is prejudicial to his rights, and that whether there will or will not be any other remedy than this interdict, will depend on the solvency of the Maynards—a risk which Krohn has no right to put upon him. With regard to the case of *Still* vs. *Norton*, it has no application. What was sought to be done there, was by one partner against another; but Krohn is neither a partner nor represents one in questions between the partners. With regard to the absence of the Maynards and the want of notice to them, Blackburn in law represents all the three firms. He is the only person in the Colony who does represent them, while Krohn does not represent them in any one respect, except as between the Graham's Town firm and its customers in the settlement of their accounts. For all purposes of law H. & C. Maynard are here and applicants for this interdict. I am of opinion that upon every ground the interdict should be made perpetual. But as the Court is equally divided, there can be no order; and the order for an interdict *nisi* therefore continues undisturbed.

CLOETE, J.:—The matter may be mooted again when there is another Judge sitting with us.

RETIEF *vs.* LOUW.

1855. Dec. 12. ,, 13. 1856. Jan. 12. Retief *vs.* Louw.

For report of this case see Buchanan, 1874, p. 165.

PORT ELIZABETH MUNICIPALITY *vs.* NIGHTINGALE.

Ord. 9, 1836.—*Liability of Municipality for damages occasioned by a bridge constructed by them being in a dangerous condition.—Duties of Municipality.*

A Municipality constructed a bridge over a ditch within Municipal limits; the bridge was constructed without a parapet wall, and in consequence of this, plaintiff on a dark night fell over the bridge into the ditch and was injured. Held, *that the Municipality was liable in damages.*

1855. Dec. 13. 1856. Jan. 12

Port Elizabeth Municipality *vs* Nightingale.

This was a review of the decision of the Resident Magistrate of Port Elizabeth, in an action brought by Nightingale against the Municipality for £10, as compensation for damage sustained by him, through their neglect in not keeping a ditch within the limits of the Municipality, and near the market-place of the town, properly fenced in, whereby the plaintiff fell into the ditch and was severely injured.

From the evidence it appeared that plaintiff was walking home on a dark night when he fell into the ditch; this was four or five yards deep in some places, and at the spot where the accident happened the road traverses it upon a bridge which has no parapet wall, and through want of this wall the accident happened. It was quite clear from the evidence that the spot was in a most dangerous state, that accidents had occurred there before, and that the condition of the place had been brought to the notice of the Municipality. The defence was that the spot was in Government not Municipal ground; but it was proved that the bridge was built by direction of the Municipality, and the Magistrate found that the place was within the Municipal limits. The Magistrate gave judgment for plaintiff for £6. The Municipality appealed, and the case was heard before EBDEN, J., at the Circuit Court. A question of jurisdiction was raised

before him, as the case involved a question of the title to the road. The case was then by order of the learned Judge removed to the Supreme Court.

Porter, A.G., appeared for the Municipality, but did not rely upon the want of jurisdiction in the Magistrate.

The respondents did not appear.

Cur. adv. vult.

Postea (Jan. 12, 1856),—

BELL, J. (after stating the above circumstances, and that the Court had taken time to consider, that it might act deliberately in laying down what to some extent would form a new precedent, in the application of the general principles of law to cases of this kind, this being the first case of the kind; and after remarking that the question of jurisdiction was no good ground of appeal, in that the question of title had nothing to do with the case, since the spot was within the Municipal limits) said:—The Commissioners derive their authority under Ord. 9, 1836. That Ordinance gives the householders of a town power to adopt Municipal Regulations for its government, and to appoint Commissioners for carrying into effect these regulations, whose services in the discharge of that duty are to be gratuitous. [The learned Judge then referred in terms to §§ 28, 34, 36, 37, 38, 41, 45, 46, and continued]: It surely cannot require argument to shew that no other person could interfere to perform any of those things which the Ordinance gives the Commissioners power to perform. The mere giving them power then to erect a bridge, where the erection shall be deemed necessary, infers the exclusion of interference by any other individual or public body, to do that act or to perfect it, after it shall have been begun. . . . I do not mean to express any opinion further than the necessities of this case require. I do not mean to say whether any one could have interfered to compel the Commissioners to erect the bridge which was the cause of this accident, if they had omitted to do so. The ditch might have been dangerous in its original state, or it might not. It is not necessary for me to say what relief the community or an individual could

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have had, if the ditch had been dangerous, and the Commissioners neglected or refused to make this bridge. But certainly if the Commissioners chose to interfere under the powers given them by the Ordinance and to build a bridge, they were bound, like every private individual or other public body, to exercise the power they possessed in a way that would not be detrimental to the public. (The learned Judge then commented upon the argument used, that the Municipality could not be liable for acts of *omission*, as the present, and remarked that it was an act of *commission* to build a bridge in such a dangerous state as the one in question.) Nobody had a right, if any could have been found willing to bear the expense, to build the parapet. If any one had attempted to do so the Commissioners might have prevented them. If they are not to be liable for damages occasioned through this act of theirs, then the public is without a remedy. . . . . *Jones* v. *Bird*, 5 B. & Al. p. 837, was a case of this nature. The Court of King's Bench disregarded the argument of the Commissioners of Sewers, a statutory body, that they had acted *bonâ fide* under their statutory powers, and that the inhabitants should have watched over and protected their own interests. Abbott, C.J., said, "Injury may be by an injurious act, or by omitting to do an act proper and necessary;" and BAYLEY, J., said it was not enough that the Commissioners acted *bonâ fide* to the best of their skill and judgment, they were bound to conduct themselves in a skilful manner. . . . On the whole I am of opinion that the judgment of the Magistrate should be affirmed with costs in this Court and in the Circuit Court, if any were incurred.

CLOETE, J. (after referring to the circumstances and disposing of the point as to the ground being within Municipal limits) said:—The next question arises, whether the Commissioners are at all *bound* by law to keep up and maintain in proper order such roads and bridges as to make them safe and proper for general traffic and passengers. This question is also satisfactorily answered by referring to §§ 36, 37 of Ord. 9, 1836, which enact that the Commissioners are vested with the *dominium* over such roads and bridges as are found within their respective limits, and that they are "*bound*" to keep them "in good and sufficient

repair," &c. But the *Attorney-General* has further argued that, although they may be obliged in such general terms to keep up and repair such roads and bridges, yet they, as a body, are not liable to such claims for damages, which they may be found quite unable to meet.

In answer to these arguments we have to see, *first*, whether such bodies corporate are, by reason of their municipal functions, freed by law from any such liability; and the decision on this point is clearly found in the first principles of the Roman-Dutch Law, which enacts in the Digest, *ad Legem Aquiliam*, 9, 2, 29, "*Magistratus municipales si damnum injuriâ dederint, posse Aquiliâ teneri.*" This authority clearly establishes that municipal bodies are as much liable to claims for damages sustained by reason of their culpable neglect as any private person would be. But the *Attorney-General* has further maintained that, after all, in this case, there has been no "*act done*" by the Municipality which may be said to amount to neglect; that they cannot be supposed at all times to prevent the possibility of accidents, and that if this were a *culpa* or neglect, it would be one of omission, and not of commission. But this nice distinction is so fully explained by *Voet* in his *Commentaries ad Legem Aquiliam*, that we have but to refer to § 3 to see how this distinction ought to be legally considered. It is there admitted that for some acts of omission parties are not liable; as, for instance, if a horse or beast falls into a stream and is likely to be drowned, yet a passer-by is not liable to any action *ex lege Aquiliâ* if he omits to jump into the water and save the animal. In like manner, if a person is seized with a fit or serious accident, and a passer-by fails to help him or run to the nearest doctor. These are all cases of omission or neglect of duty which, as a Christian or a member of a civilized community, we may be expected to perform; but they belong to those *officia imperfecta* in society where our own conscience and moral obligation ought to be the measure of our conduct. In such cases *Voet* clearly lays down that no person or Municipality can be liable to an action; but the case is different where the act omitted to be done is an act which is required or directed to be done. In those cases he tells us that the act of omission is coupled with the act of commission, and thence arises the legal liability. Now in this case the Commissioners are

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directed to maintain and *keep* in repair the roads and bridges over which they have a right of property. They are constantly bound to keep them in such a state as to have them safe for the public; and although we may well imagine cases where they cannot be held liable if a sudden accident had placed these roads or bridges in a dangerous state, yet the evidence in this case shews that they had ample notice of the dangerous state of the place. This is sufficient to shew that the Commissioners, when once invested with the lands, roads, and bridges belonging to the public, are bound to keep them up in such a state as not to endanger the lives of those who have a lawful and common use of them; that they are vested with the power of assessing the inhabitants generally for the express purpose of keeping in proper repair all such lines of communication required by the public, and that consequently they are as liable as any private individual would be, if, after such roads or bridges are known to them to be in such a state as to endanger the lives of those using them, they neglect to keep them in such a state as to prevent similar accidents. . . For these reasons I am of opinion that the Magistrate's judgment should be confirmed.

Judgment accordingly.

[Attorney for plaintiff in review, A. HUTCHINSON.]

In re CHIAPPINI.

Ord. 6, 1843, §§ 56, 77, 98, 99.—*Notice.—Resolution of creditors as to disposal of furniture.—Costs.*

At the third meeting of creditors in an insolvent estate, after the reading of the trustees' report, in which no reference to a grant of his household furniture to the insolvent was made, this subject of a grant was discussed, and the discussion adjourned to a subsequent meeting: thereafter a meeting was called on fourteen days' notice, the notice stating that this was "a special meeting for the purpose of considering the trustees' reports presented at the third meeting, and for giving instructions to the trustees as to the management of the estate and for general business."

The Master presided at this meeting, and the creditors present granted the insolvent his household furniture: on the application of certain creditors who objected to the grant, the proceedings at this meeting were set aside as informal, the meeting not being called in conformity with § 99.

1856.
Feb 12.
„ 13.

In re Chiappini.

Notice of motion in this case was served upon the trustees in the insolvent estate of E. L. Chiappini, calling upon them to shew cause, at the instance of certain creditors on the insolvent estate of A. Chiappini & Co. and the separate private insolvent estate of E. L. Chiappini, partner in the said firm, why a resolution to the effect "That the insolvent be allowed the undisturbed possession of, and right to his furniture, plate, wearing apparel, and bedding," passed at a certain special meeting of creditors in the said private estate before the Master on October 30, 1855, should not be set aside with costs, and the same meeting and all proceedings therein declared null and void on the following grounds:—

"1. That the second meeting was not called in terms of Ord. 6, 1843, § 99, inasmuch as the said section provides that the trustees may, with the consent of the greater part in number and value of the creditors who shall have proved their debts at any meeting, whereof, and of the purposes of which, twenty-eight days' notice shall have been given in the *Government Gazette*, permit any insolvent to retain for his own use, the whole or such part of his wearing apparel, bedding, household furniture, and tools of trade excepted from the sale of his movable property as the said creditors shall agree to allow; whereas only fourteen days' notice was in the first instance in the said private estate given of the said meeting."

There were further objections: that at the time of the passing of the resolution there was no proper inventory or appraisement of the furniture; and "that the said grant or permission to retain his movable property will always be objected to, on the ground that the insolvent by reason of his conduct is not deserving of any grant or allowance from his creditors" (but upon these last two points the Court gave no decision).

Brand, C.J., for applicants.

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Denyssen for respondents.

Voluminous affidavits were read on both sides, but the facts upon which the judgments are founded will sufficiently appear therefrom.

BELL, J.:—It seems to me that this motion must be conceded on the first point. The direction of the Ordinance is very distinct. By § 98 the trustees are required, "subject to the directions of the creditors given in manner before provided," to "forthwith proceed to make sale of all the property belonging to the said estate," &c. (his Lordship here read the section). The "manner before provided" is laid down in § 77, which enacts (his Lordship read the whole section). Now what is it that took place here? A meeting of creditors was held on October 10, being the third meeting required by the Ordinance. At this meeting the report of the trustees, which was its proper business, was read; but without there being any reference in the report to the grant of furniture to the insolvent now in question, a discussion was raised on that subject, in conformity with a most irregular course of proceeding, as we are told, in the Master's office—under which it would appear that it is usual to dispose, at the statutory third meeting, of questions as to granting their household furniture to insolvents. The discussion was adjourned to a subsequent meeting which was to be called. A meeting accordingly was advertised on October 16, to be held on October 30, by a notice in these terms:—

"All persons claiming to be creditors under the said estates are required to take notice, that a special meeting of creditors will be held before the Master of the Supreme Court, at his office, at the public buildings, Cape Town, on Tuesday, October 30, 1855, at 10 o'clock precisely, for the purpose of taking into consideration the reports presented by the trustees at the third meeting, for giving instructions to the trustees as to the management of the estates, and for general business."

Now did that notice meet the requirements of § 99, which regulates questions of this kind? (His Lordship read § 99.) So far from the business of the meeting being mentioned in the advertisement or "the purpose thereof," the business mentioned is the ordinary business prescribed by the Ordinance to the third meeting, and no intimation is given that anything more is to be done than such ordinary business—not a hint is given to any creditor that the

meeting is to be held for the purpose of taking into consideration the special application of the insolvent for his furniture, as § 99 expressly requires. Even if that could have been considered under a notice which omitted the "purpose" of the meeting as required by the section, the length of notice is not that prescribed, the notice given being only fourteen days, while the section prescribes twenty-eight days. But, it was argued, the case is one which, considering that the question had been taken up at the third meeting, and been adjourned, might be governed by § 56, which enacts (his Lordship read the whole section, and continued): That section has in my opinion no application. It is intended to provide generally for such cases as are not otherwise provided for—this case is expressly provided for by § 99; there is therefore no occasion to resort to § 56. But even if we were to do so, there was no requisition of one-fourth of the creditors; neither was there twenty-eight days' notice as required by § 56. But it is said, the proviso to the section allows shorter notice if the Master authorise it; and it is argued that as the Master was present at the third meeting, which authorized the calling of the adjourned meeting, and as he was also present at the adjourned meeting, called on fourteen days' notice instead of twenty-eight, he must be held to have sanctioned this proceeding. It is argued that we are by inference to suppose that the Master, because he was present at both meetings, authorized, in the language of § 56, the trustees to call the meeting upon some shorter notice, viz., fourteen days instead of twenty-eight. That is asking us to go a great way—to presume that the proceedings of the Master are always regular, when, in fact, it appears that they are always irregular. We have the affidavit of his clerk that he does under § 77 what should be done under § 99. It would be asking us, in any case, to go a great length, to presume regularity in an officer where we have his own evidence that he is habitually irregular; but it is sufficient to say that such implied authority cannot satisfy the requirements of this § 56, even if it governed the case, which in my opinion it does not. The truth is, that the parties have been going at haphazard, from the first, without looking at one section or another. I am of opinion that this application must be granted.

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CLOETE, J.:—This is an application praying to set aside a certain resolution passed by the creditors on October 30, by which a majority of creditors then present appear to have given away, *ex proprio motu*, certain furniture and movables then possessed by the insolvent. I confess that when the notice in the *Gazette* was once read, it struck me at once that there was such an infringement of the law as rendered it necessary to set those proceedings aside, not one of the requirements of the Ordinance having been complied with. It has been astutely argued by the counsel, nominally for the trustees, but actually, as he said, for the insolvent, that § 25 would appear to bear out the proceedings before the Master; but on looking at that section it will be found that the whole of the provisions therein contained (as regards the disposal of furniture, &c.) refer solely to the creditors deciding on such matters, at the first and only meeting held before the Master, in estates, where the assets only amount to less than £75. But in § 56 there is indeed a further power given to the Master or the trustees to call special meetings to give directions to the trustees, concerning any matter or question relating to the administration of the estate; but that section is merely a general and introductory one giving a power to the Master to call such meetings when trustees get into any unusual difficulties, by questions arising as to the disposal of property. In such cases it is quite competent for the trustees to apply for the intervention of a meeting, and the Master is to call that meeting; and in certain cases he may even exercise this discretionary power as to a shorter notice than twenty-eight days; but at all events the object of the meeting must be set forth—a proper and necessary provision, in order that the creditors and the public should know, specially, the object for which the meeting is called, that such proceedings as the taking away or disposal of property should not be carried on behind their backs; and for this purpose § 99 has been introduced as a separate provision of the law. Those of us who were privy to the passing of the present Ordinance will remember that this part was taken *ipsissimis verbis* from the former one, for the very purpose of preventing particular creditors from getting up such a resolution without a fair notice to the other creditors, and even in such cases a further proviso was introduced, that every such

resolution of the creditors should again be subject to the approval of the Supreme or Circuit Court. But it goes further: § 99 also requires that the resolution to give away the furniture, &c. of the insolvent must be sanctioned "by the greater part in number and value" of the creditors attending such meeting, and on all these points it is necessary to see whether those who have to administer the law have complied with these requirements of the law, which ought to be their *a*, *b*, *c*. Now there is no proof before us, in the certificate of the Master, that he observed any one of those requirements. All that we have is, that there was a meeting before the Master, pursuant to a resolution taken at the third meeting of creditors,—not a word in the notice as to the disposal of furniture, &c. of the insolvents, but only "for giving directions for the management of the estate, and for general business." Could any one for a moment dream that the creditors could, under such a notice, dispose of property to the value of at least £500, and take that amount out of the assets of the estate? And where is there the slightest proof that the number and value of the creditors were actually present who passed this resolution? A memorandum in Mr. Reid's handwriting states that there were such and such creditors present; but is this any proof that there had been twenty-eight days' notice? Does it prove that the notice set forth the express purpose of the meeting? Or does it set forth that the greater part of the creditors in number and value consented to this proceeding? The whole proceeding is entirely irregular and contrary to the express provisions of the law; and therefore the application of the opposing creditor must be granted, and the resolution set aside with all its consequences. . . . I also think that the charges of these proceedings should not be visited on the estate, but that the parties, whoever they are, or those who have authorized and sanctioned them, should bear the expense.

WATERMEYER, J.:—I concur in the opinion that the resolution taken at the meeting of creditors on Oct. 30 regarding the furniture, &c. of the insolvent should be set aside. Sect. 99 of the Ordinance, regulating the manner in which insolvents may be allowed to retain their household furniture, &c., by a resolution at a meeting of creditors, has

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two essential requisites. The first of these is, that the purpose for which the meeting is held should be made public,—and the second, that twenty-eight days' notice should be given of such meeting. In the present instance the notice related to the report of the trustees and the general management of the estate, and did not make mention at all of any intended proceedings regarding the insolvent's furniture, as required by § 99. Further, the notice was one of fourteen days, instead of twenty-eight, as enacted in that section. Thus neither of the requirements of the law in matters of this nature has been complied with. Even if the want of sufficient notice were cured by the shorter time allowed under certain circumstances by § 56 (if that be applicable to the special proceeding under § 99), the other objection would be fatal. But neither have the requirements of § 56 been complied with, and no proof of the Master's authority shortening the specified period of notice has been given, to allow any deviation from the strict terms of the law. I have therefore no hesitation in saying that the resolution must be set aside as null, on the ground of the irregularity of the proceedings under which it was taken. With reference to the costs I differ from the opinion that the costs should be borne by the respondents in their individual capacity. It has been the usual practice in cases where decisions have gone against trustees to give the costs against them generally—so that the payment should be made out of the estate—the creditors having an opportunity, if they object to such payment, of stating such objection against the trustees' accounts. I see no reason for departing from this course in the present instance. I think the application should be granted with costs.

BELL, J.:—I said nothing about costs; but I quite agree with my brother WATERMEYER that it must be left to the creditors. The party moving will have his costs as against the estate; whether the trustees will be allowed theirs, the creditors must determine.

CLOETE, J.:—I willingly agree with my brothers as to this case, but only hope that it will not go abroad that a rule exists, that in all such cases the costs are to be borne by the estate; for such flagrant acts might be brought by

the trustees as to make it necessary to visit the costs personally upon them.

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Application granted with costs.

COLONIAL GOVERNMENT *vs.* DU TOIT AND MULLER.

Ord. 6, 1844, § 2.—*Auctioneer's licence.—Sureties.*

A. & B. entered into a bond on April 9, 1851, *to the Government as sureties for the amount of auction duty to be paid by C., who took out a licence as auctioneer on that day: the licence was for one year, and fresh licences were taken out by C. in* 1852, 1853, *and* 1854. *C. failed to hand over duty between Oct.*, 1852 *and* 1854. Held, *that A. and B. were not liable upon the bond for any default of C. occurring after April* 9, 1852.

1855.
June 14.
Aug. 2.
1856.
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Colonial Government *vs.* Du Toit and Muller.

This case was heard before EBDEN, J., at the Uitenhage Circuit Court, who gave judgment for the plaintiffs, with stay of execution, in order that the opinion of the Supreme Court might be taken thereon.

The summons called upon S. J. Du Toit to pay the sum of £1000, and S. H. Du Toit and G. F. Muller the sum of £500 each to the Civil Commissioner of the Uitenhage Division acting on behalf of the Colonial Government, owing by virtue of a recognisance entered into under Ord. 6, 1844, dated April 6, 1851, by which the two last-named defendants bound themselves to pay the above-mentioned sums in case S. J. Du Toit should not within three months from the date of every sale made by him as licensed auctioneer pay such sums to the Civil Commissioner as duty as are imposed by the Ordinance; and stated that the said Du Toit as auctioneer conducted sales subject to duty between Oct. 1st, 1852, and June 30th, 1854, but that he did not pay any duty upon them; that this duty amounts to £716 15*s.* 4½*d.*, and that upon payment of this duty the plaintiff is willing to forego any further claim.

The defendant S. J. Du Toit confessed judgment for the amount of £716 15*s.* 4½*d.*

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The other defendants pleaded:—

1st. General issue.

2nd. That by Ord. 6, 1844, § 2, it is provided that the licence taken out by any person to exercise the trade of auctioneer shall be for one year and no longer; that on April 9, 1851, they entered into a recognisance required by § 8 of Ord. 6, 1844, and that thereupon S. J. Du Toit obtained a licence for one year from April 9, 1851, to April 9, 1852; that the recognisance only bound them for one year reckoned from April 9, 1851, when the licence was taken out, and that they are not liable for any neglect or omission of S. J. Du Toit which took place after April 9, 1852.

The recognisance bound S. J. Du Toit to pay £1000, and each of the other defendants £500; and then proceeded as follows:—"The condition of the above recognisance is such that if the said S. J. Dutoit shall by virtue of or in reference to these presents obtain a licence to exercise the trade of an auctioneer, he shall render to the Civil Commissioner an exact and true account of the total amount of money bid at each sale, &c. . . . and for that purpose shall produce . . . all books kept by him relative to his said trade or business on the first day of every quarter, to be computed from July 1, 1844, and shall within three months from the date of such sale make payment of all sums of money imposed on him by way of duty by this Ordinance, and shall whenever thereto required . . . . declare under his hand whether or not he has in any specified period held any sale as such auctioneer as aforesaid, and if he shall do so then this recognisance to be void, but otherwise to be of full force and effect."

August 2, 1855.—The case was heard before the full Court (WYLDE, C. J., BELL, J., EBDEN, J.) by leave of the Court and consent of counsel as an appeal.

Porter, A.G. (with him *Watermeyer*) for plaintiff.

Brand, J. H., for defendant, admits that the auctioneer's licence was taken out for 1852, 1853, and 1854, and refers to *Code* 4–64–7; *Harrison's Digest*, p. 435, "Recognisance"; *Bowsfield* vs. *Tower*, 4 Taunt., p. 454; *Wheelwright* vs. *Jutting*, 7 Taunt., p. 304; *Thomas* vs. *Young*, 15 East., p. 617.

Judgment was deferred, and the case was directed to be re-argued.

Postea (Feb. 14, 1856),—

After argument, THE COURT (BELL and CLOETE, JJ.) dismissed plaintiffs' claim as against the sureties, and reversed the judgment of the Circuit Court in respect of any liability of the sureties beyond April 9, 1852.

1855. June 14. Aug. 2. 1856. Feb. 14.

Colonial Government vs. Du Toit and Muller.

[Plaintiffs' Attorney, A. WYLDE.
Defendants' Attorneys, INNES & ELLIOTT.]

CROLL qq. KERR *vs.* BREHM.

Award.—Presence of only one party to arbitration at meeting of arbitrators.

Where the representative of one of two parties to an arbitration was present at an adjourned meeting of the arbitrators, and the other party was absent; and no evidence was taken at this meeting, and it was sworn that no new matter was introduced: a motion to make the award founded on the decision of the arbitrators come to at this meeting a rule of Court, refused.

Motion to have an award made a rule of Court.

1855. Dec. 13. 1856. Feb. 21.

Croll qq. Kerr vs. Brehm.

The circumstances were as follows:—The arbitration was between Croll, who lived at Port Elizabeth, as representing Mrs. Kerr, on the one side, and Brehm, who lived at Uitenhage, on the other; and the arbitrators were Chabaud and Graham, with power to call in an umpire. On September 18 a meeting of the arbitrators was held at Uitenhage in presence of both parties. At this meeting the case was gone into very fully, but no decision was come to. On October 5 another meeting was held. At this meeting the two arbitrators were present, and Marshall, who had been called in by them to act as umpire; and also Croll, but Brehm was absent. The conference between the arbitrators lasted for five hours. Graham, one of the arbitrators, swore that at this meeting no new matter was brought forward or entered into that had not been brought forward and discussed at the first meeting when Brehm was present; that at the conclusion of the investigation he (Graham) was of opinion that Brehm was fairly indebted to Kerr in the sum of £450 or upwards;

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but Chabaud contended that not more than £310 was proved, to which amount he would on the part of Brehm submit, but no more; that thereupon he (Graham) communicated to Croll, who was present, his opinion and difference with Chabaud; that after "privately consulting" with Croll for some time, he (Croll) told deponent that this dispute with Brehm was very vexatious and inconvenient to Kerr; that she had no other resource than the money then owing by Brehm, and inasmuch as further delay and litigation would only add to her vexation and inconvenience he would under all the circumstances rather consent to take an award of £310 as offered by Chabaud, and requested deponent to agree to it, which he did, and the award was accordingly made. The statement of Graham that Croll was present during these five hours was confirmed by Marshall.

Cur. adv. vult.

Postea (Feb. 21),—

BELL, J. (after narrating the above circumstances) said:—It was argued that the Court would not disturb the proceeding if it should appear that substantial justice had been done between the parties; but that argument proceeded on a mistake. This Court has no power to consider whether justice has or has not been done. The arbitrators are the judges, and the only judges, of that. All that this Court can do is to see that the rules which regulate proceedings under arbitration have been adhered to. It is a principle of every jurisprudence, from which arbitration cannot be exempt, that every step in procedure should be conducted in the presence of both parties. In this case it is abundantly proved that Croll was present at the time the arbitrators considered their award, and that Brehm was absent and was not represented by any one. This alone is quite sufficient to dispose of the motion adversely to the rule that is asked. Graham swears, no doubt, that nothing took place at the meeting of October 5 which had not taken place at the meeting of September 18; but that is a bold oath; for it is impossible that any man could swear correctly that a conversation of five hours' duration introduced nothing that had not occurred at a previous conversation. He swears, moreover, that Chabaud

consented on the part of Brehm to a decree of £310, he (Graham) thinking that £450 was due. What right had Chabaud, who ought to have been acting as an indifferent judge, to consent to anything, as agreeable to Brehm? This Court cannot recognise that he had any authority from Brehm to do a thing which was quite inconsistent with his character. But, as I said before, the simple fact of Croll being present and Brehm being absent, is quite sufficient to dispose of the motion. Even although it should appear that nothing whatever took place on the part of Croll—if he did not use his voice to influence the arbitrators, his personal presence might influence them, and the personal presence of Brehm might have counteracted that influence. But we have the evidence of Graham, the arbitrator, that Croll was not a silent auditor, for he (Graham) "privately consulted" with him, and during that consultation Croll made the appeal to his feelings about the inconvenience to Kerr from the want of money, which is set forth in Graham's affidavit. Would not that affect the minds of the arbitrators? And if Brehm had been present, would he not possibly have made a statement which would have counteracted that effect? I am of opinion, therefore, that this motion must be refused.

CLOETE, J.:—I quite concur in the judgment just given, as to the irregularity of the arbitrators in coming to a decision at their final meeting of October 5. Nothing is more clearly laid down in the text-books than that arbitrators are judges in deciding the matters submitted to them, and that they ought to follow those broad rules laid down for judicial investigation; and no rule is more clear than that they should not proceed to examine parties or witnesses in the presence of only one party, that nothing may be done *inauditâ alterâ parte*—so as to give the opposite party the opportunity of answering or rebutting such evidence. In this case it is however said that on October 5 last, at the meeting held by the arbitrators, they did not hear or examine any parties or witnesses, and that no new matter was brought forward. But the broad fact is, that that was a special meeting, which continued for several hours, for finally settling the balance between the parties, and determining upon their award, and that during the whole of this discussion one of the parties was present and not the other.

1855. Dec. 13. 1856. Feb. 21. — Croll qq. Kerr vs. Brehm.

I have not the least doubt as to the illegality of such a proceeding. Although the authorities quoted only refer to the case of examining witnesses, our judgment of this day will go a step further, and establish the principle that when arbitrators, as judges, retire to consider their decision, one party should not be present without the other also; and that, as when we retire within our closet, or chambers, to come to any decision on any question argued before us, it would be the height of impropriety that one of the parties should be present at the discussions and oscillations of opinion which frequently take place. It is also remarkable that, although on the argument of this case in December last the judgment was deferred to give time for Mr. Croll to answer the affidavits then before the Court—he being then in this town—that yet no affidavit of Mr. Croll has now been produced; thus confirming the opinion which the judges must have, that he was present during the whole time of the discussions of the arbitrators, in coming to their final award. I think it right that by our judgment this day we should establish this principle: that when arbitrators are finally coming to a decision, it is quite as dangerous, improper, and irregular that one party should be present the whole time, without the other having an opportunity of hearing, without notice of all those facts, as it would be improper in the examination of witnesses. This is the broad ground on which we should go. I should, however, add, that it does not appear to me that substantially Mr. Brehm has had anything to complain of, and that although we are now bound to entertain his objection, the result may possibly be that he has only gained a loss, if the claims have again to be rigidly scrutinized. This, however, will be for the parties to consider hereafter. We are only called upon to, and now do, determine, that arbitrators should not be allowed to consider that they can admit one or other of the parties litigant to be present at, and thus to influence, any decision which they may have come to.

WATERMEYER, J.:—I concur in this opinion. I have no doubt that in this case substantial justice has been done between the parties; but the question is one of principle, and it would be extremely dangerous if the Court sanctioned the doctrine that it was legal or proper, in a matter of arbitra-

tion, for one of the parties to be present while the arbitrators consulted with reference to the decision they had to give. As far as we can judge from the affidavits, this deliberation took about five hours, and Mr. Croll, one of the parties, was present during the entire period. Now, it is impossible to say that this might not have some influence, and that thus the interests of the other party might not be compromised. I do not believe that in this instance Mr. Croll's presence, or the communication between him and one of the arbitrators, injuriously affected Mr. Brehm; but this is not the question to be decided. It is enough that the presence of one party, and the opportunity of communication between him and the arbitrators, while engaged in their decision on the evidence, would, under ordinary circumstances, have a natural tendency to exercise an influence injurious to the absent party. The motion for making this award a rule of Court must be refused.

FORBES, STILL & CO. *vs.* SUTHERLAND.

Principal and agent.—Purchase by agent, on joint account of himself and another, of goods entrusted to him to sell, declared void.

L. & Co. were agents of plaintiffs to sell certain coals. They sold them to defendant on joint account with themselves: defendant knew that the coals were a consignment to L. & Co. as agents: defendant gave bills for the price, and these were renewed from time to time: the greater portion of the coals was delivered to L. & Co., the remainder to defendant: L. & Co. sold certain of the coals, crediting these sales to the joint account of themselves and defendant: subsequently, defendant and L. & Co. agreed to cancel the above purchase on joint account, L. & Co. to provide for the bills: thereafter L. & Co. sold some of the coals and credited the proceeds to plaintiffs: L. & Co. did not provide for the bills, and two or three months after the cancellation, surrendered: shortly before the surrender defendant claimed the coals in L. & Co.'s possession and took symbolical delivery.—Held, *that the sale by L. & Co. to defendant was void and fraudulent in law; that*

plaintiffs were entitled to delivery of the coals, or to judgment for their value, less the price of such as had been sold by L. & Co. on plaintiffs' account, subsequent to the cancellation.

1856. March 4. „ 5. Forbes, Still & Co. vs. Sutherland.

This was an action brought by plaintiffs, merchants in London, against defendant, for the recovery of £1100, the value of certain coals, under the following circumstances:—

In May, 1854, the *Liddesdale* arrived with a cargo of coals consigned by plaintiffs to Levicks and Sherman. Mr. Sherman handed over these coals for sale to Long, Ebden & Co., who already had certain consignments from plaintiffs in hand, upon the understanding that Long, Ebden & Co. and Levicks & Sherman should divide the commission. Before the coals were all landed, Long, Ebden & Co. sold them to defendant —459 tons at 67*s.* 6*d.* per ton. This purchase by defendant was on joint account with Long, Ebden & Co. themselves. The coals were principally stored in a store belonging to Mr. Charles Long, near Somerset Road; but part of them were placed in the store of Mr. J. B. Ebden in the Keizersgracht, and forty tons for which there was no room in those places were taken at once by Mr. Sutherland to his own premises. After the sale to Sutherland, Long, Ebden & Co. sold some of these coals, in small quantities, to various parties, all of which were delivered out of the store of Mr. J. B. Ebden. The proceeds of these sales were credited by Long, Ebden & Co. in their books to their joint speculation with defendant. Some considerable time afterwards—when did not distinctly appear, but probably about the latter end of February or beginning of March, 1855—Mr. Sutherland being in the office of Long, Ebden & Co., Mr. G. N. Ebden said to him, "That coal speculation of ours does not seem to promise particularly well; suppose we cancel the sale." To this Sutherland agreed, and leaving Ebden, went into an inner office, where Mr. Charles Long then was. To the latter, defendant said: "Ebden has suggested the cancellation of the sale of the coals, but in that case you will provide for the bills." These bills were bills originally given by defendant for the amount of the coals at 67*s.* 6*d.* per ton, but which had been twice renewed, and the last renewals of which were outstanding at the time of this cancellation.

Immediately after this interview with the defendant, two

entries were made in the books of Long, Ebden & Co., by one of which the proceeds of the sale, which had formerly been credited to the joint speculation, were taken from the credit of that speculation and passed to the credit of Forbes, Still & Co.'s consignment account; by the other entry this consignment account was debited and the defendant credited with the amount of the coals sold to him in May, 1854. Long, Ebden & Co. then resumed the selling of the coals as opportunity offered, and credited the proceeds of all sales after the cancellation to the plaintiffs. In the course of the month of April, Sherman required Long, Ebden & Co. to give an account of what they had sold, and what they had on hand belonging to plaintiffs. Long, Ebden & Co. in compliance with this demand wrote to Sherman, giving him an account of all the sales which they had from time to time effected of these coals, and stating that they had on hand belonging to plaintiffs 350 or 360 tons. On May 31, 1855, Long, Ebden & Co. surrendered. Before the surrender—but whether the day before, or how soon before, neither Mr. Ebden nor Mr. Charles Long in their examination could state—the defendant came to the office of Long, Ebden & Co., and, alleging that he claimed the coals as his, the bills which he had given not being yet retired, obtained possession of the key of the store in Somerset Road, and in consequence of his claiming the ownership of the coals in that store as well as in the store of Mr. J. B. Ebden the action was brought. The declaration stated that the cargo of coals was delivered to Long, Ebden & Co., who undertook as commission agents to sell the coals for a certain commission; that thereafter Long, Ebden & Co., in May, 1854, sold to defendant, who knew that they were such factors, 459 tons at 67*s.* 6*d.* per ton, but whether there was any delivery the plaintiffs were unaware. That afterwards, and contrary to their duty as such factors, the said Long, Ebden & Co. agreed with defendant to cancel the said sale, which was accordingly cancelled, and the coals were re-delivered to Long, Ebden & Co. if they were ever delivered. That afterwards Long, Ebden & Co. gave defendant symbolical delivery of a portion of the coals, in order to protect him against certain promissory notes which he had given them. That defendant claimed to retain possession of these coals and also of another portion stored in the warehouse of J. B. Ebden of which he had not

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had any delivery. That defendant pretended that the delivery had been given in payment of the sale in May, 1854; yet that if that were so, as the sale had been cancelled, Long, Ebden & Co. could not give nor could defendant receive delivery of the coals in contemplation of Long, Ebden & Co.'s sequestration. That the coals were worth £2 10*s.* per ton; and the plaintiffs prayed that defendant might be condemned to pay the plaintiffs £1147 10*s.* with interest, or otherwise to deliver the coals and pay £459 as damages for their unlawful detention.

The defendant pleaded the general issue, and specially, that defendant in May, 1854, at the instance and request of Long, Ebden & Co., agreed to purchase on joint account with them and did so purchase 459 tons of coal at 67*s.* 6*d.* per ton without being informed at that or any other time of the name of the original or pretended owner of the coals. That defendant at the request of Long, Ebden & Co. gave them his promissory notes for £1,549 2*s.* 6*d.* in settlement of the said sale, on condition that these notes should be paid out of the proceeds of anticipated sales of the coals. That it was agreed "at the instance and request" of Long, Ebden & Co. that they and defendant should "respectively" be authorised to sell the coals as opportunity offered. That in consideration of defendant having passed his promissory notes the coals were "duly delivered" to defendant. That "at the instance and request" of Long, Ebden & Co. the defendant on two occasions renewed his promissory notes, he continuing to have jointly and separately the right of sale and disposal of the coals. That in April, 1855, Long, Ebden & Co. offered to cancel the said sale upon their retiring defendant's promissory notes. That Long, Ebden & Co. were unable to take up the promissory notes, in consequence whereof defendant paid them, wherefore he retained and still retains possession of the coals as he had and still has a right to do.

Porter, A.G., for plaintiffs, referred to the breach of law and sound morals involved in the original sale of May, 1854, contending that factors employed to sell can never be either individually or together with any other person the purchasers of goods entrusted to them. Whatever might be thought of this transaction, yet when Long, Ebden & Co.

and defendant agreed in 1855, when the price of coals had fallen and was likely to fall still further, to cancel the sale so as to throw back the article upon plaintiffs, they were clearly bound to abide by that cancellation. It was proved that it was no condition of that cancellation that the outstanding bills should first be paid. If Long, Ebden & Co. had not become insolvent they would have retired the bills, and all the loss upon the coals would have fallen upon plaintiffs, who would never have heard of the sale to defendant in May, 1854.

Denyssen, for defendant, contended that the cancellation had been not absolute, but conditional. That unless the bills were paid, there was no cancellation; and, therefore, as Long, Ebden & Co. had become incapable of fulfilling that condition, defendant was entitled to the coals for which he had given his bills.

Cur. adv. vult.

Postea (March 5),—

BELL, J., said:—In this case the principal difficulty we experienced was in considering how to dispose of the case under the form of declaration which has been adopted. [The learned Judge here stated the terms of the declaration, and continued]: This declaration, though it sets forth statements sufficient perhaps to show the nullity of the sale in May, 1854, in respect of the character held by Long, Ebden & Co., and known to defendant, does not anywhere challenge the sale upon that ground. On the contrary, it proceeds as if the sale had been originally valid, but had become nugatory in consequence of the subsequent cancellation, and asks for delivery of the coals or payment of their price, on the ground that, after cancellation, the coals had been placed within defendant's power, to cover obligations of his in favour of Long, Ebden & Co. and in contemplation of their sequestration. However, as the relief asked is not in its nature inconsistent with what in one view might have been granted had the plaintiffs challenged the validity of the sale in May, 1854, and is, in extent, within what the plaintiff might in that view have been granted, the declaration does not, I think, present an insuperable difficulty to our arriving

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at the conclusion we have come to on considering the case. [His Lordship here referred to the terms of the plea, and continued]: Now, if we do not look at the evidence at all, the story disclosed by the plea is this:—Long, Ebden & Co. having possession of 459 tons of coal for sale, go to Sutherland, ask him to become with them purchasers on joint account, on condition that he gives his promissory notes to them for the price, and, after the notes have been frequently renewed, they propose to cancel the sale on condition that they take up the notes. They did not take up the notes, and therefore defendant insists on a right to make the coals available for that purpose. Now I have not the least hesitation in saying that the sale disclosed by this plea, without reference to the evidence, was in the outset fraudulent in law and void in regard both to defendant as well as Long, Ebden & Co.; since the story told by the plea discloses sufficient to satisfy me that defendant was cognisant of the character in which Long, Ebden & Co. held the coals. When a commission agent has property entrusted to his care, he is bound to give his principal every benefit of his skill and information in regard to its disposal, and to hold himself entirely aloof from any advantage other than his commission. The factor is to consider the interest of his principal, and no other interest whatever. See *Story's Equity Jurisprudence*, § 315, and *Hunter* v. *Atkins*, 3. My. and K., p. 113, where LORD BROUGHAM said: "The person standing in such a relation must, before he can take a gift or even enter into a transaction, place himself in exactly the same position as a stranger would have been in." The same doctrine is to be found in *Voet*. To apply these doctrines to the present case, before Long, Ebden & Co. could sell these coals to themselves, they ought to have delivered them over to Sherman, who had been entrusted with the bill of lading in the first instance by the plaintiffs, while uncertain as to the stability of Long, Ebden & Co., and they should have said to him, "Hold these for our London principal, and we will deal with you." The doctrine does not say that the plaintiffs must shew that the transaction was an unjustifiable one, but the burden is upon the agent to shew that he had cut off the connection that had bound him to his principal, and that nothing that has happened might not have happened if no such connection existed. This sale on the arrival of those

coals to Long, Ebden & Co. was a void sale, and it was perfectly competent for the plaintiffs to have rested their case there—and either to have required the sale to be cancelled and annulled, or to have elected to stand by the sale and have left defendant and Long, Ebden & Co. to settle their interests among themselves. But plaintiffs have not adopted that course, and the difficulty I felt was in regard to the exact nature of the case which they have set up in their declaration, and whether it treated the sale in May, 1854, as entirely at an end and rested the case on what happened subsequently. But I think the declaration merely narrates the sale and what followed, and then adopts the course of demanding the coals as still the plaintiffs' or their price £2 10*s.*, instead of 67*s.* 6*d.*, the price at which the sale to the agents and to the defendant had been made, and which, as I have already said, the plaintiffs might have demanded if they had chosen to adopt that sale. [His Lordship here discussed the merits of the case on the evidence, and proceeded]: Without connecting the defendant with the fraud practised by Long, Ebden & Co. upon the plaintiffs, the authorities I have read make it clear that the agents could not make the sale to themselves without fraud; and it requires very little reasoning to see that if *they* could not, a party dealing with the agents for participation in the sale, knowing that they were agents, must be affected by their fraud in the making of the sale, which—distinguishing the sale from the subsequent conduct of the agent, that I may not implicate the defendant in that subsequent conduct—was a fraud in law, though not necessarily a fraud in fact or morality as well. But, without leaving this to reasoning merely, the doctrine I have read from *Story* and from *Voet* establishes that a party dealing with an agent, knowing him to be such, is open to the same objection as is pleadable against the agent. *Paley* in his work on *Principal and Agent* (3rd ed., ch. i., § 7, p. 37) says: "An agent who deals as a merchant without the express consent of his principal is accountable to him for the profits made by this indirect dealing." And he refers to the case of *Massey* v. *Davies*, 2 Ves. jun., p. 317, which was that of an agent having a fixed salary joining with a third party in selling wood to his employers; when the Court decreed the agent to make good the profits to his employers, and declared that it would have

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done the same as to the third party, had the evidence shewn that he had been cognisant of the agent's character as such. Another case will be found in *Chitty's Equity Index*, p. 2577 (3rd ed.), *Brookman* v. *Rothschild*, 3 Sim., p. 153, where an agent bought for himself and his partner in business the stock of his principal, and the Court would not allow the purchase to stand. So in this case, the sale made by an agent to a party who knew he was an agent cannot be allowed for one moment to stand. The plaintiffs might have said, "We hold to the sale; give us £3 7*s.* 6*d.* per ton." Or they might have said, "We disavow the sale; give us the coals or the price, which we fix at £2 10*s.*" They have adopted the latter course, and it seems to me they have a right to the judgment of the Court for delivery of the coals, or, if that cannot be, for the price of the 459 tons, less such quantities as may have been sold by Long, Ebden & Co. to other parties, which one of the witnesses said amounted to 71 tons. For the price of these the plaintiffs must be creditors on the estate of Long, Ebden & Co. They are entitled to have the judgment of the Court for the price of these coals at £2 10*s.*, because that is much within £3 7*s.* 6*d.*, which in the views I entertain of the law the plaintiffs might have demanded. I do not, therefore, consider the price of £2 3*s.* 6*d.* in July and August as affecting the case; and if the principles I have laid down be correct, it is needless to enquire whether the price of the sale to Long, Ebden & Co. and defendant was a fair one for that time, nor whether the market was then a rising or falling one, so as to justify what was done, or the reverse. The transaction being once proved, the sale is null, and the plaintiffs may adopt or repudiate it at their pleasure, without regard to the attendant circumstances, whether justificatory or extenuatory, or otherwise, as to which I say nothing.

WATERMEYER, J.:—I concur in this judgment. The relatoin of principal and factor is of a fiduciary nature, and demands the utmost protection of the Court. It is a clear rule of modern law, adopted from the civil law, that an agent for the purpose of sale cannot purchase his principal's goods—an agent for the purpose of purchase cannot himself be the seller. The doctrine is in the well-known text: "*Tutor rem pupilli emere non potest; idemque porrigendum est ad*

similia, velut curatores, procuratores et omnes alios quae aliorum negotia gerunt. In this case it is perfectly clear that the factors, Long, Ebden & Co., could not legally purchase these coals, the property of their principals. Then arises the question whether, under the circumstances, the purchase by them with Sutherland jointly is in the same position as the purchase by them solely. I clearly think it is. It is said in the plea, and has been stated during the case, and is in evidence, that defendant was not told that these were the coals of the plaintiffs. True. But defendant could not but know from the facts in proof and the nature of the transaction that these were not the coals of Long, Ebden & Co.—that they were a consignment, though he did not know who had consigned them. He therefore knew, or is presumed in law to have known, that he was, contrary to law, joining with factors in purchasing the goods of their principals. This sale the principals at any time subsequently, or within a reasonable time, are entitled to set aside, or to claim, with reference to the conduct of their agents, such relief as they may be fairly entitled to. The principle is not alone in the civil law that the tutor, procurator, or factor cannot purchase directly; but it is *neque per se neque per interpositam personam;* neither directly nor indirectly. . . . . It is needless to enquire further into the evidence as to the transaction between the parties. The sale was an illegal one, and the plaintiffs were entitled to come into Court to claim such relief as they considered themselves fairly entitled to have. [The learned Judge then commented upon the value of the coals at the time of the sale in May, 1854, and stated his view that although the plaintiffs might perhaps have claimed the value of the coals at £3 7*s.* 6*d.* per ton, they were in any case clearly entitled to the £2 10*s.* per ton which they claimed.]

Judgment for the plaintiffs with costs.

[Plaintiffs' Attorney, A. HUTCHINSON.
Defendant's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

Osterloh *vs.* Civil Commissioner of Caledon.

Act 5, 1855, §§ 8, 13, 14, 17, 18, 19, 20.—*Divisional Council Election.—Duties of Civil Commissioner.*

At an election of Divisional Council there were three candidates. V. received the greatest number of votes, but he was not a registered voter; the Civil Commissioner, under Act 5, 1855, *declared O., the second on the poll, elected. His election was duly published in the* Gazette, *and he attended meetings of the Council: thereafter the Civil Commissioner gave public notice that a new election would be held. O. obtained an interdict restraining this election, and a motion to dissolve such interdict was refused.*

It is the duty of the Civil Commissioner to determine the result of an election of Divisional Council, in accordance with the provisions of Act 5, 1855, *and having declared such result he is "functus officio."*

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Osterloh *vs.* Civil Commissioner of Caledon.

An interdict was granted by Cloete, J., in Chambers, on the application of one Osterloh, restraining the Acting Civil Commissioner of Caledon from proceeding to a new election for a member of the Divisional Council, to take place in virtue of a notice from him dated October 12.

The present motion was for a dissolution of this interdict.

The circumstances were as follows:—The election for the Divisional Council took place in Caledon in the beginning of September. For district No. 2 three persons were voted for—Honourable Vigne, M.L.C., Messrs. Osterloh and McIntyre. Mr. Vigne had 193 votes, and Mr. Osterloh was next with 34. Mr. Vigne was not at the time of election a registered voter for the division of Caledon, and the Acting Civil Commissioner, by publication in the *Gazette* of September 14, under § 17 of Act 15, 1855, published the name of Mr. Osterloh as member of the Divisional Council, and he accordingly took his seat as member. On October 23 an advertisement appeared in the *Gazette* stating that a new election for District No. 2 having become necessary, such election would take place on November 26, 27, 28. This new election was restrained by the interdict now sought to be dissolved.

Porter, A. G., maintained that Vigne having been voted for by a large majority of the electors who had no notice of the fact of his disqualification, the publication of Osterloh's name as a member of the Council was erroneous. That Osterloh had never been duly elected, and that therefore it was the duty of the Civil Commissioner to put matters in motion for the purpose of a new election. It must not be presumed in matters of this nature that voters intended to throw away their votes, and therefore when there has been no notice to voters of a disqualification of the person for whom they vote, there must in every case be a new election; that the person chosen by a minority could not under such circumstances claim a seat, as duly elected. If the voters had had notice of the disqualification, and had persisted in voting, it would have been different, and Osterloh would be duly elected. The mere erroneous publication of Osterloh's name in the *Gazette* did not constitute him a member, therefore the only proper course for the Civil Commissioner was to order a new election.

Brand, C. J., maintained that it was not for the Civil Commissioner under the Act to judge at all with reference to Osterloh's right to retain his seat at the Council, after the publication in the *Gazette*. The duty of the Civil Commissioner was merely ministerial. He was to declare, after going through the preliminary steps, who had been elected a member of the Council, and to publish the result of the poll in the *Gazette*. When he had done this he was *functus officio*. It was for any one who felt aggrieved by the result of the election as published by him to appeal to the Supreme Court. Any voter might raise the question, but the Civil Commissioner could not treat his own declared result of the poll as void. So purely ministerial are his functions that it was his duty to declare Vigne elected, as he had the majority of votes; but not having done so, he is bound at least by his own publication; and having discharged all his duty under the Act, cannot at any time after place himself in motion for the purpose of a new election, the prior one, declared by him, not having been set aside.

Porter, in reply.

BELL, J.:—This is a motion to dissolve an injunction, which had been granted by my brother CLOETE to restrain

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the Civil Commissioner of the division of Caledon from holding an election of a member of Divisional Council for District No. 2 in the room of Osterloh, by whom the interdict had been obtained. It appears that the polling for members under Act 5, 1855, was completed on September 5, that the field-cornets of the districts discharged the powers given them by § 13 of the Act by returning to the Civil Commissioner a list of the persons voted for, and of the number of votes which each had received. It further appears that the Civil Commissioner received these returns and discharged the duty imposed upon him by § 14, by comparing the lists with the polling papers and "ascertaining" for whom the greatest number of votes had been given—that the Civil Commissioner also executed the power given him by § 17, by publishing in the *Government Gazette* the name of Osterloh as the member who had been elected for District No. 2; and that he did in the same *Gazette* give a notice of a meeting of the Council, required by § 18, but that he did not give the private notice to each member also required by that section. Osterloh, availing himself of the public notice, attended the meeting of the Council, and sat as a member once, if not oftener. On October 23 an intimation appeared in the *Government Gazette* of an election to be held for District No. 2, "it having become necessary that a new election should take place for a member of the Divisional Council of Caledon for District No. 2." This is the election which the interdict restrained. The motion to dissolve the interdict is made by the Civil Commissioner. Osterloh has taken a preliminary objection that the Civil Commissioner has no title to make such a motion, that he has merely ministerial duties to discharge under § 14, and these being done, his power is ended. That he can merely look at the lists returned by the field-cornet, and has no power to enquire whether the person returned by the field-cornet, as having the largest number of votes, had the qualifications prescribed by § 8 of the Act, to wit,—whether he was a registered voter for the division, and was not a person holding an office of profit under the Crown or an uncertificated insolvent. The Civil Commissioner on the other hand has argued that he has judicial functions to exercise, as well as ministerial, and that his duty is to go on, until, as he argues, a member has been duly elected, and that he is not stopped by having

notified the election in the *Gazette*, if he afterwards find that the election has been void for any reason. It seems to me that both of these arguments are erroneous in some degree. I am of opinion that up to the notification of election in the *Gazette*, the duties of the Civil Commissioner are not merely ministerial, but are in some respects judicial as well; he is not only under § 14 to see that the lists returned by the field-cornet do not embrace non-electors, but he is to "ascertain," which I construe to mean "determine," for whom the greatest number of votes have been given, and, in doing so, he is bound to see that the person returned as elected has the qualifications prescribed by § 8. Having done these things, and given the notification required by §§ 17, 18, he has exhausted all the powers, judicial or ministerial, given him by the Act, and is entirely *functus* as to the election. If that be so, and he have not any powers inherent in his office, in regard to this election—which assuredly he has not—if his powers in regard to the election must be found within the four corners of the Act, which they assuredly must, then immediately upon his "ascertaining" that the greatest number of votes had been given to Osterloh, as he was required to do by § 8, then, under the words of that section "and such person shall be the member of the Divisional Council for such District," Osterloh was the member of Council, and the Civil Commissioner's *judicial* functions were at an end, and his *ministerial* functions also ended, on the publication of the notifications in the *Gazette* required by §§ 17, 18. If there were any ground of nullity in the election, by reason of disqualification, error or mistake—and many such besides those suggested in the course of the argument might occur—the Civil Commissioner had no power to amend the election or to take other proceedings in the matter. It lay with the unsuccessful candidates or the voters to move in the matter, and the place for them to have obtained relief was in this Court. These Divisional Councils are popular institutions for the protection of local popular interests, as the preamble of the Act shows. But if it were in the power of the Civil Commissioner, acting by the advice of the Government in this instance, as we are informed, to do what the Civil Commissioner here has done, it might very well be that in a depraved period of the history of the Colony, the Government

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might pervert these popular Councils to the accomplishment of local purposes adverse to the interests of the people. For by § 19 the Civil Commissioner is to be Chairman of the Council, and he is to have two votes—a deliberative vote and a casting vote; and by § 20, three members, including the chairman, form a quorum. It is easy to see, therefore, that if the Government wished to carry any measure in the Council which was distasteful to its members, and if the Civil Commissioner could, as in this case, hold the election of any member to be null, then, if the Civil Commissioner secured the vote of one member only, all that he would have to do would be to treat the elections of the other members as nullities, and to carry his measure through while the question as to these nullities was being agitated in this Court. However disastrous these consequences might be, yet if the Act had been so framed as to justify that argument, it would have been the duty of the Court to decide in conformity with that argument. But, fortunately, the Act is not in my opinion so framed, and the Civil Commissioner does not possess, by its terms, the power he has contended for.

I am of opinion, therefore, that the interdict, restraining him from holding the new election, should stand, and that this motion to dissolve that interdict should be refused with costs.

WATERMEYER, J., concurred on the ground that the publication under § 17, by the Civil Commissioner, in the *Gazette* was a public declaration of his judicial decision, that the persons whose names were published by him had been duly elected. His office was not merely a ministerial one, but it was his duty, under the Act, to decide the question whether a candidate was duly qualified or not, and other matters relating to the election. What was published by him was the result of his decision, which he was unable and incompetent himself to review or set aside, after publication. The motion for dissolution of the interdict should therefore be disallowed with costs; the Civil Commissioner not having the power, under the circumstances, to proceed with a new election. Any one interested in the matter might object to the right of Mr. Osterloh to sit in the Divisional Council, as having been unduly declared elected, and thus the question would be properly raised.

THE COURT gave no opinion as to the question raised by the applicant's counsel, as to the right, or the contrary, of the second candidate on the poll, under the circumstances stated, to take his seat on the Divisional Council.

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STAINES *vs.* GRAHAM, TRUSTEE OF WATTS.

Costs of Schedules.

The expenses incurred in a case of voluntary surrender, in the preparation of schedules and valuation annexed to the petition for acceptance of surrender, as forming part of the costs of sequestration of the estate, must be paid out of the estate.

1855. May 20.

Staines *vs.* Watts' Trustee.

The trustee's account was objected to by the applicant, a creditor in the estate, on the ground that he had credited himself therein with the following items :—

	£	s.	d.
Cash for schedules	2	2	0
James Hall (appraisement)	2	2	0

Notice of motion was served upon the trustee to shew cause why the items for the preparation of the schedules and the appraisement should not be expunged from the account, as not being expenses incurred in the administration of the estate, but debts incurred by the insolvent prior to his surrender, to be proved by the creditors in like manner as other debts. There was also a claim for the reduction of the commission charged.

The Master reported that it had not been the practice for trustees to pay, or to take credit in their accounts for expenses incurred by the insolvent in the preparation of his schedules and valuation annexed to the petition for the acceptance of his surrender.

Porter, A. G., for applicant.
Respondent did not appear.

THE COURT stated their opinion, that, although in practice the trustee did not pay the costs incurred by the

1856. May 20.

Staines vs. Watts' Trustee.

insolvent in the preparation of his petition, &c. (these costs being generally paid at the time by the insolvent), such costs were part of the machinery put in motion by the insolvent for the purpose of surrendering his estate for the benefit of his creditors, and thus were costs of the sequestration and properly paid by the trustee. The necessity and reasonableness of the particular charges made would form proper subjects of enquiry, but in their nature, as having been incurred for the purpose of affording proof of the insolvency, without which no acceptance of the surrender could take place, they were unobjectionable. As no objection was in the present instance made to the amount of the charges, they would be allowed.

THE COURT referred to the *Nederlansch Advys Boek*, vol. 4, c. 6; *Van Alphen*, p. 226; *Van der Keessel*, Th. 451; from which it appeared that the rule in the analogous case in the Law of Holland, of petitioning for the benefit of cession, was that the costs of obtaining the writ of cession were to be paid out of the estate surrendered by the insolvent to his creditors.

WESTERN PROVINCE MINING COMPANY *vs.* THORPE.

Arrest.—Affidavit signed by one trustee of a Company, "for self and co-trustees."—Rule of Court 8.

By the trust-deed of a Company, the trustees were authorised to "bring actions," &c.; there were three trustees. A writ of arrest issued at suit of the Company set aside with costs, on the ground that the affidavit required by Rule of Court 8 *was signed by only one trustee "for self and co-trustees," notwithstanding evidence of subsequent ratification of the act by the other trustees.*

Application to set aside a writ of arrest.

1856. May 20.

Western Province Mining Co. vs. Thorpe.

The defendant had been arrested for an alleged claim of the plaintiff Company; but the affidavit required by Rule of Court 8 was signed by "Mr. Preuss for self and co-trustees." There were two other trustees besides Preuss. By the trust-deed of the Company the "trustees" were authorised to bring actions, &c.

1856. May 26.

Western Province Mining Co. vs. Thorpe.

Porter, A. G., for applicant referred to *Trustees of Dodds, King & Co.* vs. *Watson* (1 Menz., p. 140), where it was held that a warrant of attorney to sue, signed by one of two trustees in an insolvent estate "for self and co-trustee," was not sufficient to support a summons for provisional sentence, and argued that *à fortiori* this would apply in cases of arrest.

Brand, J. H., for respondents produced a document dated after the arrest, and after notice of motion of the present application, by which the two other trustees, Messrs. Brink & Davidson, ratified and confirmed the act of their co-trustee; and argued that this cured the original defect, and that on this ground the arrest should not be set aside.

THE COURT set aside the arrest with costs against respondents.

BORCHER *vs.* CLEAR.

Determination of lease by sequestration.—Ord. 6, 1843, § 104.—*Order of ejectment on motion.*

Where a lessee of immovable property became insolvent, the Court, on motion, granted a rule "nisi" calling upon him to show cause why he should not deliver up the property, and made the rule absolute on his default..

1856. June 3. „ 12.

Borcher vs. Clear.

The applicant leased a certain property to Clear, who became insolvent. This was a motion for an order on the insolvent to deliver up the property leased, by reason of the determination of the lease by sequestration, under Ord. 6, 1843, § 104. Proceedings for ejectment had been brought before the Resident Magistrate, who considered that he had no power to entertain the case in consequence of the sequestration.

Porter, A. G., for applicant, stated that the application for the present order was the only course open, unless an expensive suit of ejectment were commenced in this Court.

THE COURT were of opinion that the order of sequestration was equivalent to a judgment of this Court that the lease

1856. June 3. „ 12. Borcher vs. Clear.

had determined, and the granting of the present application was a means of enforcing that judgment. This being the first time the question had been raised, a rule *nisi* was granted, calling on respondent to show cause on June 12.

Posted (June 12),—

The rule having been duly served on respondent, he did not appear, and the order was made absolute for delivery up of the property to applicant.

WILSON'S TRUSTEES *vs.* MARTELL.

Transfer.—Completion of sale.—Agreement of mortgage by insolvent.—Ord. 6, 1843, § 103.

In January, 1855, *W. purchased, through a broker, from defendant, house property "to be clear of all mortgage or burden whatsoever"; the consideration was certain mining shares, and the sale was to take effect from the date of the broker's note. W. gave and defendant accepted delivery of the greater number of the shares; in June,* 1854, *W. surrendered, and his trustees gave notice that they would abide by the agreement; but they did not offer to defendant the remaining shares till October,* 1855, *at which time the shares had fallen greatly in value: before this latter date, defendant offered to restore the shares already delivered, and to treat the contract as rescinded. The trustees now sued defendant to give transfer of the property, and tendered the remaining shares.*

Held, *That the defendant was bound to give transfer in terms of the tender.*

It was agreed between W. and defendant immediately after the above contract of sale, that defendant should advance £600 *to W. to enable him to make improvements on the property sold, and on another property belonging to W., on condition that simultaneously with defendant giving transfer, W. should execute a mortgage bond upon the property sold, in*

defendant's favour for £600. £400 was so advanced to W., and defendant now claimed in reconvention that plaintiffs, W.'s trustees, should pass a mortgage bond for £400 in his favour, on receiving transfer; or should pay him £400 out of the the proceeds of the property when sold.

Held *(by a majority:* CLOETE, J., *diss.), That plaintiffs were bound to pass the bond or pay £400, on receiving transfer.*

1856.
June 10.
„ 12.

Wilson's Trustees vs. Martell.

In this case the declaration set forth that defendant had been summoned in an action of transfer by plaintiffs as trustees in the insolvent estate of John Wilson.

The plaintiffs alleged that on January 13, 1855, the insolvent had, through the agency of M. Dobie, a broker, purchased a house and garden from defendant: the following broker's note being given:—

"*Cape Town*, January 13, 1855.

"Bought for account of J. Wilson,

"From Mr. C. Martell.

"That house and garden situated in the Cape Flats called 'Haredale,' and all outhouses with land attached thereto, as laid down in the diagram of the estate; to be clear of all mortgage or burden whatever, for the consideration of the following mining shares, viz.:—

60 Cape of Good Hope Mining Co.
7 Western Province.
19 Nabas.
25 Hare's.
5 Walwich Bay.

Purchaser paying the transfer dues.

The sale to be of effect from the date of this note.

"(Signed) M. DOBIE, broker.

"Seller to pay brokerage."

That there was due delivery and acceptance by defendant of all the shares except four Western Province and twenty-five Hare's; and on June 13, 1855, the insolvent surrendered his estate, of which they, the plaintiffs, were confirmed as trustees in July.

That in conformity with Ord. 6, 1843, § 103, they gave notice to defendant of their having resolved to abide by the sale and purchase, and demanded the due completion thereof.

There was also an averment that the defendant "before the surrender of Wilson's estate gave him a promissory note for £137 6*s.* 8*d.*, for the purpose of paying off a certain mort-

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gage on the house and garden, but which promissory note the said John Wilson, instead of employing in manner aforesaid, appropriated for other purposes, and that, although they were not bound to repay the said sum of £137 6s. 8d., they tendered this sum, together with the delivery of the deficient shares,—if he the defendant will make transfer and conveyance of the aforesaid house and garden called 'Haredale,' to the said plaintiffs, in their capacity as aforesaid, which the defendant neglects and refuses to do." Wherefore they prayed judgment in terms of this tender.

The defendant pleaded the general issue. And further: that, admitting the contract of exchange or barter set forth in the declaration, and that all the shares, with the exception stated, had been delivered, the remaining shares were not delivered by the insolvent, nor by the plaintiffs after the sequestration, within a reasonable time,—and that the plaintiffs only on October 9, 1855, offered the still undelivered shares, at which time the value of all the mining shares for which the defendant had agreed to barter "Haredale" had very greatly declined, and that at that time the still undelivered shares were quite valueless.

The plea stated further that on August 20 defendant offered to plaintiffs to restore the shares which he had received, on repayment of such instalments as he had paid on them, and to consider the contract of exchange or barter as rescinded, which offer was declined; and claimed that inasmuch as the "shares remaining undelivered left the whole transaction open, and deprived the defendant of the chance of realising to advantage the shares which he had actually received, and inasmuch as he had offered to restore the shares received by him when a reasonable time had elapsed for the delivery of the shares remaining undelivered," and as he now again offered to restore the shares received by him and to treat the contract as rescinded, he ought not now that all these shares are of little or no value to be compelled to give transfer.

As a claim in reconvention, in case the Court adjudged that he was bound to give transfer, defendant alleged that upon, or immediately after the making of the contract of barter, it was further agreed between defendant and Wilson, that he should advance to Wilson the sum of £600, to enable Wilson to effect certain improvements in "Haredale,"

and also in another place called "Uitvlugt," Wilson's property, upon the express condition, that as soon as Wilson should obtain from defendant transfer of "Haredale," he should, *simul et semel* with the making of the transfer, execute a mortgage bond, hypothecating both "Haredale" and "Uitvlugt" for the payment of the £600: that on faith of this stipulation he lent to Wilson at different times between February 1 and April 15 the sum of £400, and that he was at all times willing to have advanced the balance of £200: that Wilson did not desire more than the £400, but offered on May 21, 1855, on receiving transfer of "Haredale," to mortgage the same for the sum of £400, and in addition for the £137 6*s.* 8*d.* mentioned in the declaration, which offer the defendant agreed to accept, and that while this sum remained so lent on faith of the mortgage agreed on, Wilson surrendered his estate; and that the plaintiffs, as his trustees, have sold "Uitvlugt" and transferred it to the purchaser. The defendant therefore submitted to the Court "that the plaintiffs, requiring, as they now require, the said defendant to divest himself in their favour of the ownership of 'Haredale,' are bound to execute, in favour of him, the defendant, a mortgage of the said house or place for the sum of £400, which they refuse to do, alleging that they are entitled to receive transfer unconditionally, and that defendant can neither retain the said property for the sum of £400, nor claim that plaintiffs shall execute the mortgage." Wherefore defendant prayed that plaintiffs should on receiving transfer in the terms stated in the declaration, execute in the usual form a first mortgage on the house for the sum of £400—or otherwise, if more convenient to the plaintiffs, that they be condemned to pay out of the proceeds of "Haredale," when realised by them by public sale, the sum of £400.

Brand, C. J., for plaintiffs.

Porter, A. G., for defendant.

There was no conflict upon the facts, and the evidence given will be found sufficiently set forth in the judgments.

Cur. adv. vult.

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conditions upon which this amount was advanced, and the legal effects of these conditions—form the subject of a separate enquiry, an independent transaction relating originally to "Haredale" in conjunction with another property, and subsequently to "Haredale" alone.

For the purpose of the legal enquiry, the question resolves itself to this: What is the position of trustees and vendor, where a sale has taken place of immovable property to an insolvent, and the purchase-price has been satisfied, but transfer has not been given by the vendor, who has advanced money on the faith of an intended mortgage in favour of him, the vendor, by the insolvent as soon as he has obtained transfer? The trustees claim from the defendant a real right; they demand the completion of the sale by tradition *coram lege loci*. The defendant claims from the trustees a real right upon this tradition,—the completion of his security by mortgage effected before the Registrar at the time that he gives the trustees the "*dominium*" by tradition *coram lege loci* or an equivalent to this mortgage.

The claim of defendant is not for a mortgage of property vested in the insolvent at his surrender—but for a mortgage on property which, through himself, is to become vested in the trustees of the insolvent. In order to understand the difference it is clear that by no form of words could a contract have been framed between Martell and Wilson before the surrender, which could be enforced after the surrender, by which it had been undertaken to give a mortgage of "Uitvlugt," which was the insolvent's and vested in him at the surrender. Where the property is vested in the debtor, a mortgage, or any right in the nature of mortgage, could be obtained only by hypothecation publicly executed. Whatever amount of money therefore might have been advanced upon security of an intended mortgage on "Uitvlugt," the order for sequestration once made, the creditors of the insolvent could not be compelled to carry out this obligation of intended mortgage, and the creditor who advanced the money would be obliged to obtain his dividend in concurrence with other unsecured creditors. The reason of the public registry of hypothecations as well as of the public "tradition" of immovables is, as *Voet* says, "*Ne quid fiat in fraudem creditorum.*" Whatever the hardship in particular cases, the policy of the law requires that

these hardships should be endured rather than that facilities for fraud should be given.

As the doctrine of "tradition" *coram lege loci* and of the registry of hypothecs in like manner rests on the same principles, a reference to decisions on questions arising under the former head will, to some extent, guide us in cases under the latter.

The leading case is that of *Harris* vs. *Buissinné* (2 Menz., p. 105), decided in 1840. The purchaser, who had paid the purchase-money, claimed transfer from his trustees of the property purchased from the insolvent. Judgment in favour of the estate was given "solely because in that case the property of the house, transfer of which was claimed from the trustees, had been vested in Buissinné, and as by the law of the Colony he could not divest himself of it, except by a regular transfer executed *coram lege loci*, it was vested in him at the time of the surrender of the estate, and consequently by virtue of the surrender *eo ipso* devolved to the trustee for the behoof of creditors."

The case of *Van Aardt* vs. *Hartley's Trustees* (2 Menz., p. 135) followed in 1845, and was removed from the Albany Circuit Court by MENZIES, J., for the purpose of a decision by the full Court whether the judgment in *Harris* vs. *Buissinné* should govern a case in which, at the time of the surrender, the house and farm sold were not actually vested in the insolvent by the solemn tradition required by law; the insolvent having sold to the purchaser from him, at a time when he had indeed purchased and had possession, but had not got transfer, and having surrendered while the circumstances continued the same. The Court held that *Harris* vs. *Buissinné* did not govern such a case, and decided that the trustees of Hartley's estate were bound to give to Van Aardt, who had purchased the insolvent's interest in the farm, the conveyance *coram lege loci* which should make him legal owner of the property, immediately upon their receiving transfer in favour of the estate. The true principle of these decisions consists in this: the salutary law of public registry for the prevention of fraud was carried out as in the case of *Harris* vs. *Buissinné* according to the doctrine in *Voet*, 41-1-39, 42; but it was not extended in *Van Aardt* vs. *Hartley's Trustees* beyond its special scope and object, the repression of transactions which might afford opportunity

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for fraud upon creditors. In *Buissinné's* case there was publicity by means of the registry to all the world, his creditors especially, that he was the owner of the house in question. In Hartley's case the world could not be deceived to give him credit, on a belief that he was the owner of the property bought by him, but not transferred to him, and sold by him to Van Aardt. The special law governed *Buissinné's* case in favour of creditors. The general principles of law, for Hartley was not placed in the position contemplated by the special law, decided the case of *Van Aardt* vs. *Hartley* against the creditors, who suffered no injury.

By the aid of these two cases, which are by no means in conflict with each other, but plainly reflect the different legal results of the different circumstances, let us approach the present somewhat more nearly. It is plain, according to *Van Aardt* vs. *Hartley*, that if Wilson, not yet having transfer, had before his insolvency made a re-sale of half of "Haredale," say for £400, at any time after January, to Martell, and had received the purchase-money, the trustees could not uphold the bargain of January and claim transfer without being compelled to give Martell transfer of the half immediately after they had received transfer of the whole. Or in application of the same principle, if, after the bargain of January, Martell had bought from Wilson for £400, instead of the half share, another restriction of *dominium* in the shape of a right of servitude on "Haredale," to be enjoyed by him, and to be inscribed in the transfer as soon as it was given by Martell to Wilson, it follows naturally that exactly as a re-transfer of a half would be decreed in the former case, the condition or servitude would be inserted in the transfer of the whole in this. Nor would in this instance the *Placaat* of 1529, the foundation of our law, and *Voet's* doctrine, on which *Harris* vs. *Buissinné* was decided, be infringed any more than it was infringed in *Van Aardt's* case.

Are these same principles to be applied in the present case? It has already been laid down that if at any time before sequestration Wilson had had transfer of "Haredale," as of "Uitvlugt," nothing could be done after the sequestration in pursuance of any compact to give him a mortgage as against creditors, for the order for sequestration vested the

property in his trustees, unburdened by such mortgage. But is this to be extended to cases where there was no such vesting in the trustees? In the pure Civil Law, irrespective of the Dutch law of tradition and of registry, the delivery of possession of "Haredale" would have been perfect delivery to Wilson, and in that case the advance of the money on the agreement of mortgage to Martell would have immediately effected the mortgage. This is not adduced for the purpose of shewing that, but for the requirement of the special law, which the trustees now seek to enforce to obtain title, without securing the defendant for his advances, there would not in the present instance have been a claim for a mortgage on the property, with respect to which they demand from the vendors to place them in the possession of legal ownership, but there would have been an actual mortgage. And I would further add, as a conclusion justly founded on analogy, that by what took place between Martell and Wilson respecting the advance of the money to the latter, resulting at length in the letter of May, by which a less security was accepted than that originally agreed on, Wilson gave to Martell in security of his advances, and placed him in possession of a special right in the interest which he (Wilson) had in "Haredale"—this special right being secured to Martell by the only security of which it was susceptible, the retention by him of the title of "Haredale," not to be parted with by him to Wilson or his representatives unless, on the change of position with regard to "Haredale," of Wilson, or his representatives—his (Martell's) special right in Wilson's claim to "Haredale" was also secured in the only manner in which, upon transfer, it could be secured —by payment of the money advanced, or by a mortgage.

If these views be correct—and I offer them as the result of full consideration, though with much diffidence, as I am aware they are not partaken by an authority for whose judicial opinion I have the utmost deference—I conceive that the decision of the Court, in accordance with the prior decisions to which I have referred, and preserving in their full vigour our admirable laws of registry of titles and of mortgages for the repression of fraud, should be that the defendant Martell, claiming in reconvention, is entitled to demand that upon transfer by him of "Haredale," as claimed in the declaration in convention, there shall be *simul et*

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semel a mortgage in his favour for the £400 advanced, or that he shall be entitled to this amount out of the proceeds of the sale, if the property be sold.

With reference to § 103 of the Ordinance, which was referred to during the argument, I may add that there seems to be nothing in that section which refers only to agreements in the nature of purchase of immovable property by insolvents, which would have entitled the trustees to repudiate the transaction of the advances and intended mortgages; nor does any other section in the Ordinance give them that power; nor is the case embarrassed with any considerations that might arise under the 84th and following sections of the Ordinance.

CLOETE, J. (after stating the circumstances of the case), said: I quite agree with the judgment just expressed, that the defendant cannot be relieved from the claim in convention, the defendant never having made any legal demand on the insolvent or on the trustees for the delivery of those few undelivered shares: and even if this demand had been made, it is very questionable whether the insolvent was *bound* in the terms of this contract to make this delivery until transfer had been given or tendered to him, it being a clear axiom of the Dutch Law *Dat geld en goed blyven niet in dezelfde hand*, and these shares being thus the money or consideration to be given, it follows that this delivery could only have been legally demanded upon giving transfer to the insolvent.

But the defendant has raised another important question by claiming in reconvention, that the plaintiffs, as trustees in Wilson's insolvent estate may be condemned, on getting transfer of the place "Haredale," to grant the defendant a mortgage on that estate for £400, advanced by him from time to time to the insolvent, or otherwise to pay him that amount out of the first proceeds of the sale of that estate.

This claim is founded on the allegation supported by the insolvent's evidence, that about the time that he made the purchase of the farm "Haredale" through the broker, he was occupying another property named "Uitvlugt," and that he was anxious to make extensive improvements on that property by putting on a slate roof, and that defendant (they being on very friendly terms) had agreed to advance him sums

from time to time, not to exceed £600, which the insolvent intended to lay out—it being agreed upon between them that when the insolvent got his transfer of "Haredale" they would, between them, find some person to take a first mortgage on the property and thus repay the defendant the amount of his advances.

Upon the faith of such an understanding, the defendant made the insolvent advances in several payments to the amount of £400, when it appears that about May 21, 1855, some d[illegible]ment took place between them, in consequence of whi[illegible]thority was transmitted to one of those agents usuall[illegible]ed to make out transfer-deeds, directing him to prep[illegible] transfer forthwith, and to make out a mortgage bond, direct in favour of defendant for the advance of the £400, to be executed with the transfer, but by the unexpected surrender of Long, Ebden & Co., on May 25, 1855, the insolvent appears to have looked over his stock and engagements with that firm, in which he was involved, which led to his stopping payment, and ultimately to the surrender of his estate, without the transfer being effected, or the mortgage-bond executed, and upon this statement of facts the defendant founds his claim in reconvention.

The question thence arising for the serious consideration of the Court is whether this agreement (to give the defendant a mortgage-bond for the amount he had advanced) be or be not part and parcel of the conditions of sale or exchange of "Haredale."

The *Attorney-General* has relieved my mind from much difficulty on this point, by at once fairly and candidly admitting that this agreement was one perfectly distinct from and independent of the deed of sale.

I think the *Attorney-General* did well not to urge the opposite position, as this would have compelled him to argue, that in this case there were both a written and a verbal agreement of sale, the one not subsequent to the other, but co-existing and marching *pari passu*, and setting forth the material obligations of the parties, and there can be no doubt that the Court could not have entertained so anomalous a proposition. But he has contended (as indeed the whole of the agreement clearly proves) that although this agreement or promise to make the insolvent an advance to make repairs and improvement to "Uitvlugt" arose from the fact of his

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purchasing and removing to "Haredale," that yet it was quite a distinct and independent transaction, and must be viewed in that light, as to fact, and the question then arises as to the law, whether the trustees are bound by, or can be called upon to "implement" such an agreement, and I regret to say that my acquaintance with the laws I am about to administer, compels me to dissent from the opinions just expressed on this point, and that I cannot for a moment conceive how the plaintiffs, as trustees in an insolvent estate, can be called upon legally to carry out such an engagement.

By the insolvent or bankrupt laws of every country, I believe it to be clear that by the surrender of an estate all contracts or engagements of a personal nature made by the insolvent or bankrupt cease and determine. The bankrupt is deemed to be *civiliter mortuus*, and the only remedy which parties who have had agreements or engagements with him, have, is to prove the amount of their damage upon his estate. The Insolvent Law of this Colony has adopted this principle in regard to all leases, in § 104, and as to actions then pending by or against the insolvent in § 23, 24. A reference to those sections will show how they are to be dealt with, that those actions from which the trustees conceive the estate to be benefited may be taken up by them, and those arising from any wrong or injury done to the insolvent or his family may be continued for his own behoof, but in the particular instances of agreements having been entered into by the insolvent for the sale or exchange of landed property, a special provision has been made, empowering the trustees in such estate to use their discretion as to abiding by and *executing* such *agreement*, or abandoning the same, as the trustees in this case have exercised in requiring the completion of this contract of sale and exchange, but the defendant now claims that although he confesses that his advance of money is not part and parcel of the agreement of sale or interchange, and that it is quite independent of that transaction, yet that the plaintiffs are bound to give him a first mortgage, or in fact to pay him the first assets from the sale of "Haredale," because he made the advance of £400 to the insolvent upon his promise or engagement to give him a mortgage on that property upon receiving transfer.

However hard the present position of the defendant may

be, I feel it to be my duty to set these considerations aside, and to ask myself upon *what legal principle* this claim is founded, and I find no other than that because the defendant has not yet given transfer of the property sold or exchanged by him, that he is entitled to bring this into computation, but I repeat I am not aware of any law authority entitling him to this claim, but on the contrary every law authority compels me to lay it down as my opinion that the plaintiffs are not legally bound to prefer this claim, on these grounds:—

1st. Defendant's counsel has admitted that this reconventional claim is entirely distinct from and independent of the action brought by plaintiffs.

2nd. The plaintiffs are by law entitled to claim the performance of an agreement for the sale or exchange of immovable property (§ 103), but they are not liable to pay out of the assets of the insolvent estate any sum of money which has not been duly proved and entered upon the liquidation account, and been subject to the *judicium preferentiæ et concurrentiæ* sanctioned by the Order of the Court.

3rd. The claim of defendant for the £400 being entirely independent of the transaction upon which the action brought by plaintiffs is founded, it follows that the Court is bound to view this in no other light, than that of the ordinary case of a demand for the payment of so much money advanced to the insolvent, the recovery of which is sought by defendant, and to view defendant as an ordinary creditor in the estate.

4th. In such a case plaintiffs are not liable nor can they be held responsible for paying any sums of money to any creditor out of the assets of the estate, as in this manner defendant is bound to prove his claim in the ordinary way, and he is to rank with the other creditors according to their legal rights.

5th. By allowing defendant's claim in reconvention, the Court would adjudicate upon a question which arose between the insolvent and defendant, to give the latter the effect of a marked preference by paying out of the estate a large sum of money to the prejudice of all the other creditors in the estate.

6th. If the principle be once conceded that the defendant is entitled to his reconventional claim, it follows that

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plaintiffs are bound to comply with such a judgment, and supposing the case (which may not be improbable) that, after deducting all expenses, the sale of "Haredale" would not realize nett the £400 claimed (independent of the £137 already required to clear off the mortgage), a monstrous injustice would arise by compelling the plaintiffs to find out of any assets in the estate, the amount of this claim to the palpable injury of the other creditors, and the subversion of every principle laid down for the liquidation of insolvent estates.

7th. That by adjudging this reconventional claim, a precedent will be established that this Court, in adjudging upon a question clearly arising under the provisions of the insolvent law, has at the same time taken cognisance of, and adjudicated upon a simple personal agreement of money lent and advanced to an insolvent, which the defendant could not possibly have claimed, but for this action in convention, and therefore the Court by adjudging the claim in reconvention would establish the principle that although a claimant for the repayment of a sum of money advanced to an insolvent could never institute an action for its recovery from the trustees, yet when he is sued in a totally different action for completing a contract for the sale or exchange of immovable property that then a person may bring forward any claim he may have had upon the insolvent, and demand them from the official trustees, who would be bound to answer such a demand.

8th. That this principle being once established and confirmed by a judicial decree, there is no limitation to the demands which such persons in the same position (as defendant now is) might make, and if the amount so advanced to the insolvent had been £4000, instead of £400, the conclusions remain the same, that the trustees would be bound to find the assets wherewith to meet this demand.

9th. That, in my view of the case, defendant thus appears to me to obtain illegally an undue preference over all the other creditors in the estate, for nothing is more erroneous than the assertion so often and readily made, that trustees are bound to carry out the engagements made by the insolvent. Hundreds of cases occur daily to show that the *trustees* are only bound to carry out those acts prescribed by the insolvent law, but are not bound *à fortiori* to carry

out obligations of the insolvent arising *ex delicto* or *quasi delicto*. These principles have not been answered by defendant's counsel (and they appear to me unanswerable), but he has endeavoured to avoid their application by pleading that at and during the time of making the contract of purchase or exchange of "Haredale," the parties had agreed *simul et semel* to execute a mortgage bond in favour of defendant to secure the repayment of the moneys to be advanced by defendant to the insolvent for improving "Uitvlugt;" but let us see how the evidence bears out this allegation. Dobie, the broker, who was the official agent to execute the deed of sale or exchange, swears that he never heard of any such agreement, and the principal witness for defendant (the insolvent himself) swears that at the time that the sale or exchange of "Haredale" took place, he being on very intimate terms with defendant, the latter had promised that he would make some advances to put a slate roof and make other improvements to "Uitvlugt," and that when the transfer of "Haredale" to the insolvent had been effected, he (or they between them) would endeavour to procure a loan on first mortgage upon this property and "Uitvlugt" conjointly (and the mortgagee to whom they intended to apply was even named), and thus "*repay*" defendant the amount of whatever sums he might have advanced. This was thus clearly an agreement in no way appertaining to, and being part of, the agreement of sale and purchase, and, indeed the *Attorney-General* did not venture to assert such a proposition; but what does the evidence before the Court further prove? That four months after the deed of sale, the defendant and insolvent had some difficulties about these mining shares and other matters, which led to the insolvent directing his agent to prepare the deed of transfer forthwith, and to prepare a mortgage bond in favour of defendant himself, for the £400 he had advanced him.

This was such a variance in the agreement as to this sum of money that plaintiff's counsel urged that on technical grounds alone the defendant's reconventional claim should be rejected. Although I held with the rest of the Court that on this technical ground alone the claim should not be dismissed, yet upon the merits of the case, and as governing the principles of this action, I conceive it to be of the utmost importance.

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It shows that defendant claims no less than that he should have the effect of being paid in preference £400 out of this estate, upon a promise or undertaking made by the insolvent four months after the contract of sale or exchange had been concluded (viz., on May 21, 1855). So that by adjudging this reconventional claim the Court would establish a principle, that such a promise to give or pass a mortgage to any creditor months or years after any transaction as to the sale of any landed property had been concluded, but not perfected by the transfer of that property, would give the lender of *any* sum of money a legal preference upon the whole estate of the insolvent, for the whole amount of such advances.

To this dangerous and startling proposition I cannot conscientiously give my assent, holding, as I do, that the defendant did rashly (like hundreds of others in our society) barter away his landed property for mining shares, that he, as rashly and inconsiderately four months after the sale of that property had been effected, got an engagement from the insolvent to give him a security by mortgage on the landed property he had previously sold to him, that that promise not having been carried out, and having, in fact, become impossible by the surrender of the insolvent's estate, a few days after that promise, the defendant is in no other or better position than many others, who on good faith make such advances to persons verging *ad inopiam*, and that trustees in such a case are not liable to make good the personal obligations of an insolvent. Upon these grounds I regret that I do not see any legal grounds for giving judgment in favour of defendant on his claim in reconvention, as I conceive such a judgment will establish a most dangerous and illegal principle, viz., that a creditor in an insolvent estate can at once obtain repayment of any sum of money which may have been due to him by the insolvent without going through any of the forms required for proving his claim and its preference, and the moment he is sued by the trustees in any action in which he may become concerned with the trustees, and I am therefore for giving judgment for the trustees on their conventional claim and for rejecting the claim made by the defendant in reconvention with costs.

BELL, J. (after stating the circumstances, and agreeing that upon the claim in convention judgment should be for

plaintiffs, continued): As to the claim in reconvention the evidence establishes that the original agreement as to the loan was, that the money was to be borrowed from third parties and to be secured by a mortgage in their favour, and that the agreement for the defendant to advance the money was a subsequent transaction. On this, it was argued that the claim in reconvention fell, by reason that the agreement proved was not that set up by the claim. But as I observed in the course of defendant's answer to this objection, there is nothing in the objection, for the agreement, of which the defendant claims the benefit, is sufficiently set out by the claim in reconvention, and therefore it is immaterial, that while the evidence establishes this agreement, it also establishes a prior agreement, inasmuch as that prior agreement is not sued on, and was superseded by the subsequent agreement. But, on the merits, it was further argued for the plaintiffs, that the contract of sale and the agreement for loan upon mortgage, were separate and distinct transactions, that they were entitled under § 103 to claim performance of the contract of sale, and to repudiate the agreement for a loan on mortgage. In other words, that, on the one hand, having delivered the price of the purchase, they were entitled to claim an absolute transfer of the land purchased, and, on the other hand, having received payment of the money agreed to be advanced on mortgage, they were entitled to keep that money without giving the mortgage, and it was in some way supposed that the case of *Harris* vs. *Buissinné* supported the latter part of this argument. It was shewn that the shares given as the price of the land have proved to be utterly worthless—that is the defendant's affair no doubt, he need not have bargained for the shares—and after he had bargained for them, he might have sold such as he received, if not also those he did not receive, while as yet they were of value in the market. But if, in addition to losing the consideration for his house, he must also lose the £400 he lent upon the security of a mortgage over it, his case would indeed be a hard one. In my opinion the law does not drive me to subject him to such a result. It was argued for plaintiff, as I have before observed, that the contract of sale and the agreement for the loan, were separate and distinct transactions—that the contract of sale

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was proved, and could alone be proved, by the broker's note —that the parol evidence, therefore, which established the conversations about the loan prior to the sale, as inductive of the sale, and what passed between the parties subsequent to the sale, in regard to the loan, was to be discarded in considering the contract of sale. So far as the contract of sale *per se* is concerned, I assent to this doctrine—no parol evidence which goes to *contradict or alter* a written contract can be admitted. The written contract is conclusive of everything contained within its four corners—but further the law of evidence does not go—parol evidence of anything that does not go to contradict or alter the written contract is admissible. The parol evidence here neither contradicts nor alters the written contract, but, on the contrary, harmonises with it. The parol evidence was not offered with the view of affecting the contract of sale. What it was offered for was to establish that the contract of sale, giving every effect to its written terms, was not an isolated independent transaction, but one made in connection with another, viz., an agreement for a loan by the vendor to the purchaser, which was the moving inducement for the purchaser to enter into the contract of sale. I know of nothing in the law of evidence which prevents the Court from entertaining and giving effect to this parol evidence, offered, as it has been, not in any way to disturb the written contract, but to establish something over, above, and beyond it. If so, the parol evidence establishes, to the satisfaction of my mind, that Wilson would not have made the purchase unless he had been promised the loan; that the loan and the sale were part of one transaction, and that the contract of sale cannot be enforced *against* the *vendor* without effect being given to the contract of loan *in favour of* the vendor, as, on the other hand, the contract of sale could not have been enforced *against* the *purchaser* without effect being given to the contract of loan *in favour of* the purchaser. This is viewing the matter independently of the specialty in the Roman Dutch Law, which I shall presently notice, and of § 103 of Ord. 6, 1843, already referred to, which I shall also notice presently. But with a view to working out the relief sought by defendant, it seems to me to be immaterial whether the two contracts must be viewed as distinct, separate, and independent. Grant that the con-

tract of sale is distinct, separate, and independent of the contract of loan—that will not destroy the contract of loan—that contract is as conclusively proved by the parol evidence and the letter of May 21, as is the contract of sale by the broker's note of January 13. If there had been no insolvency, Wilson would have been entitled to enforce performance of the contract of sale; but on the other hand, he would have been bound to perform the contract of loan. The Court, while it compelled Martell to give transfer of the land purchased, because he had received the shares, the price of the purchase, would, at the same time, have compelled Wilson to give Martell a mortgage over the land for the £400, which Wilson had received from him on condition of giving such a mortgage. Has the supervening insolvency of Wilson created any change in the rights of parties in these respects, and given the creditors of Wilson an advantage which he himself did not possess? Unless § 103 of the Insolvent Ordinance work some such change the insolvency has done no such thing; for I apprehend the creditors of an insolvent take his estate subject to the legal and equitable claims that lay against it while in the hands of the insolvent. Creditors are mere volunteers, against whom every liability competent against their debtor will prevail when they come to ask the assistance of the Court. "*In omnibus quidem, maxime tamen in jure, aequitas spectanda sit. Placuit in omnibus rebus praecipuam esse justitiae aequitatisque quam stricti juris rationem*" (*Digest*, 50–17–85, 90). § 48 of the Ordinance, vesting the estate in the trustees, gives them the "like remedy to recover the estate as the insolvent himself might have had if his estate had not been sequestrated." It gives them no other or larger remedy. If the insolvent must have given the mortgage before he could get the transfer, so must the trustees. *Harris* vs. *Buissinné* shows this; else why was it necessary to defeat the purchaser's demand for a transfer from the trustees, for them to resort to the peculiarity in the Dutch law as to transfer *coram lege loci?* The Insolvent Ordinance, in its other provisions, equally recognizes the equitable rights of parties who have been dealing with the insolvent. § 83 says that a mortgage made by an insolvent when he knew that his assets were deficient, shall be null, "unless the same shall have been made *bonâ fide* and upon valuable consideration."

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The communings of the parties, and the letter of May 21, together with the payment of the £400, surely constituted a *bonâ fide* mortgage upon a just and valuable consideration.

But the 103rd section of the Ordinance makes a difference, it is said.

What, then, says this 103rd section? It says that the trustees of an insolvent may either abide by any agreement for the purchase of immovable property which may have been made by the insolvent or "abandon the same." The trustees here have elected to abide by the contract of sale, and they argue they are entitled to "abandon" the contract of loan. When they abide by the one contract, they do not insist that they are entitled to adopt the contract so far as advantageous only: they do not say that the insolvency cuts down all the rights of the party, who had been dealing with the insolvent, in favour of the creditors, and that they are entitled to have the transfer, without handing over the undelivered shares, part of the consideration of the purchase. Not at all; they not only tender delivery of these shares but also payment of the £137 3*s.* 6*d.* of defendant's money, which had been misapplied by the insolvent. They therefore themselves shew that this clause merely gives the creditors a right to adopt or abandon contracts of the insolvent, doing justice to the other contracting party. But, when they come to speak of the contract of loan, when they come to repudiate it, by refusing to give the mortgage, they say nothing about returning the money which the insolvent had received in consideration of the mortgage. That cannot be said to be abandoning the contract of loan without an abuse of terms. To abandon would be to refuse to take the money or to give the security, but the money having been already received, to refuse to give the security is to act in fraud of the contract, and, so far from abandoning it, to take a most unjust and iniquitous advantage of it. To abandon is to give up all advantages, as well as disadvantages, to place either in the condition they were in prior to the contract. If there could be any doubt that this is the meaning of the section, it is removed by the proviso to it, which declares, not that the contracting party shall rank upon the insolvent estate for any damage he may have sustained by the abandonment of the contract, but that he shall have an action against the estate for such damage. If

the transaction was in such a predicament that the abandonment will not put the parties in *statu quo ante* the trustees shall pay the damage in that respect. But what application has this section to a contract of *loan?* What it affects is an agreement for the purchase or exchange of any estate or interest in any immovable property: an agreement to lend a sum of money upon a mortgage of land is not an agreement for "the purchase" or for "the exchange of any estate or interest" in the land; it is a mere agreement for a *security for money* over the land. The trustees, therefore, may abide by the contract of sale under this section of the Ordinance; but it does not give them any right in regard to the contract of loan, and that latter contract having been validly subsisting, prior to the date of the insolvency, must be performed before the trustees can call on defendants to perform the contract of sale.

But the Roman Dutch law, *Voet*, 41, 1, 38, says that land cannot be passed from one man to another unless it be done *coram lege loci*, and *Harris* vs. *Buissinné* decided, upon that authority, that a party who had purchased land from another, and paid him the price, could not compel the vendor's creditors, after his supervening insolvency, to give him transfer in fulfilment of the insolvent's part of the contract of sale. If the transfer which the decision of the Court will find that the plaintiffs are entitled to receive from defendant under the claim in convention, would bear the date of the contract of sale, or would draw back by relation to that date, and be held to have been passed before the Registrar of Deeds of that date, I could understand the application of this case of *Harris* vs. *Buissinné*, and of the doctrine to the present case. But inasmuch as no legal title is yet in the insolvent, and whatever title the plaintiffs may obtain under the decree of the Court must bear a subsequent date, I confess I cannot see what bearing that case has upon the present, or how the undoubted law that land cannot legally be passed, except *coram lege loci*, is to prevent the defendant from saying that before the plaintiffs can be entitled to ask a transfer from him in fulfilment of his contract of sale, they must give him a mortgage over the land, to be so transferred in fulfilment of their author, the insolvent's, contract to give him such a security for the money he has paid him.

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But while *Harris* vs. *Buissinné* seems to me to have no bearing in this case, the other case referred to by my brother Watermeyer seems to have a very important bearing on it, in confirmation of the doctrines I have enunciated, for there a party who, like Wilson, had no transfer or legal title to land, having sold land, it was found that his trustees, upon his supervening insolvency, were bound to make a transfer of the land, because the land was not vested in the insolvent *coram lege loci*, as in *Harris* vs. *Buissinné*, and the transfer was not to take out of the insolvent anything vested in him, but merely to complete, formally, the title of the purchase. Applying that case to this, the trustees are bound to perfect, formally, the mortgage which the defendant already has in equity. It has been supposed that the effect of the judgment about to be pronounced will be to compel the trustees to pay the £400, even although the property may not be worth so much, but that is a misapprehension. All that it will oblige them to do will be to give to defendant the mortgage he had bargained for, before they can obtain the transfer from him; whether that may or may not be efficient to reproduce to him the £400 is a matter the judgment will not touch. The judgment, therefore, must be for the plaintiffs in convention, as prayed, and for the defendant in reconvention, as prayed.

[Plaintiffs' Attorneys, FAIRBRIDGE, HULL & MEINTJES.
Defendant's Attorneys, J. & H. REID.]

VERWEY *vs.* HANNAY BROTHERS AND DELL.

Provisional sentence.—Presentment.—Notice of dishonour.

Where a note was made payable at a particular place, and defendant opposed on ground that the summons did not aver presentment at that place, the Court refused provisional sentence, but gave the plaintiff leave to amend on payment of costs of the day.

Where a note was made by H. in favour of D., and by him endorsed, and long after the due date personal notice of

dishonour was given to D., who then wrote across the note "accepted notice," provisional sentence was refused against D.

1856. June 14.

Verwey vs. Hannay Brothers & Dell.

Provisional sentence was prayed upon a promissory note for the sum of £297 17*s.*, dated May 15, 1854, made by defendants Hannay Brothers in favour of defendant Dell and by him endorsed: the note was made payable at the house of James Hayton, of Grahams Town one year after date, but there was no averment in the summons of presentment at such place.

Brand, J.H., for Hannay Brothers, opposed provisional sentence being granted on the summons in its present form, and referred to *Simpson* vs. *Allingham* (1 Menzies, p. 62), in which provisional sentence was refused against the acceptor of a Bill of Exchange payable at a particular place, on like grounds.

Porter, A.G., for plaintiff, argued that for several years past summonses in such cases had not contained the averment of presentment, though proof of such presentment by notarial certificate had been required. That presentment at the place of payment on the particular day, not being of the essence of the contract as far as the maker was concerned, there was no necessity for the averment of any presentment in the summons, though proof of such presentment before summons was required.

THE COURT held that the averment was necessary, and that provisional sentence should not be granted on the summons in its present state: but in consideration that a practice had obtained, which had but now been brought to the notice of the Court, the summons might be amended and stand for July 12, plaintiff paying the costs of the day.

Posteà (July 12).

Porter, A.G., again prayed for provisional sentence, and produced the notarial certificate of the notary J. Campbell, stating that on March 20, 1856, he had presented the note where it was made payable, when he was informed by the said Hayton that there were not then, and had not been at the time the note was due, any funds for the payment thereof,

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and that thereupon he personally gave notice of the dishonour to Dell the endorser, who at the time of notice wrote across the note "accepted notice," and signed his name to these words. He contended that the words "accepted notice" written across the note constituted an acknowledgment by Dell of his liability, and cured the defect that there had been no notice of dishonour to him, immediately after the note became due. It was an admission of due notice, and a waiver of what was usually required to constitute such notice.

Brand, C.J., for Dell, contended that the words "accepted notice" written and signed by defendant meant no more than that on March 20, 1856, defendant had received notice of the non-payment of this note by the bankers, but did not constitute this notice a legal notice of dishonour, after defendant had been discharged, through want of due notice, from his liability as endorser.

THE COURT refused provisional sentence against Dell, holding that the words "accepted notice" did not necessarily imply an acknowledgment of liability, and were in themselves only an admission of the fact that the notice was given, whatever might be the legal value of such notice. There was therefore no liquid claim against Dell.

Provisional sentence granted against Hannay Brothers.

[Plaintiff's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

CHRISTIE *vs.* KINNEAR.

Provisional sentence.—Liquidity.—Sett-off.—Claim "ad factum praestandum."

Provisional sentence cannot be granted on an obligation "ad factum praestandum."

Provisional sentence granted on certain liquid documents, where defendant opposed on the ground that there were accounts still open between the parties, and on these there was a balance due to him from plaintiff.

Provisional sentence was prayed against defendant upon four documents: the first two claims being for interest on mortgage bonds, the third on a written agreement of hire of certain mares and fillies, and the fourth for £200, with interest on the sum of £600, being part purchase price of a farm sold and purchased under the following document:—

"Memorandum of agreement entered into between Messrs. James Christie and William Kinnear at Beaufort, June 28, 1848.

"1. Mr. Kinnear to become the purchaser from Dr. Christie of the place Elandsfontein bought by him this day, at the cost price £600, within seven years.

"2. Transfer to be given on payment being made of one-third of the purchase amount, the remaining two-thirds to be secured by first mortgage over the place, and to be payable in yearly instalments, of £100 each, with the option to the buyer, to pay off the whole in one sum, at any time, within the period that the whole would become payable, by the yearly payments. Interest to be paid yearly upon the whole unpaid portion of the price.

"3. In the meantime Mr. Kinnear agrees to hire the place for a period of seven years, and to pay yearly from this date to Dr. Christie the sum of £36, as also the quit-rent and road rates.

"4. Mr. Kinnear agrees to pay to Dr. Christie within twelve months from this date, the expenses of transfer to him, and of the mortgage executed by him for the balance of the price; and also to pay the expenses of transfer to and mortgage by himself, and all other dues and expenses, of whatsoever nature, and all disbursements made by Dr. Christie, on account of the said place. "(Signed) J. CHRISTIE.

W. KINNEAR.

The summons tendered transfer on payment of the amount of £200 and upon defendant's "passing a first mortgage bond over the place for £400, and paying the quit-rent, road rates and also the expenses of transfer of the said place to the said plaintiff, as stipulated by the memorandum of agreement," and also prayed for the interest on the purchase amount, or otherwise, rent from 1848 to 1855 at the rate of £37 10*s.* per annum, by virtue of the said memorandum of agreement.

Brand, C. J., for defendant, opposed provisional sentence on the ground that there were accounts between plaintiff and defendant still open, with reference to which an arbitration had been proposed, the account of plaintiff against defendant amounting to £817 18*s.* 10*d.*, and that of defendant against plaintiff to £2480, which account was handed to the Court. He admitted that defendant's claim was disputed by plaintiff, who maintained that on these

1856. July 12.

Christie vs. Kinnear.

accounts a large balance was due to him, and that the present claims formed no portion of the accounts mentioned.

THE COURT granted provisional sentence on the first three documents, on the ground that the liquidity of the documents establishing the debt was not affected by other transactions of an illiquid nature between the parties.

But with reference to the fourth claim, the Court were of opinion that provision should be refused on the ground that the claim was not a liquid one. Although the claim for the £200 taken by itself might be liquid, yet, connected as it was with the tender of transfer on this payment, this transfer again not to be effected unless at the same time a mortgage bond was executed for the remaining amount of purchase-money, provisional sentence for the £200 would in fact involve a judgment for the execution of the mortgage bond, which, being a judgment *ad factum praestandum*, could not form a subject of provisional sentence,* and for the payment of other illiquid claims, of which extraneous evidence would be necessary. The agreement was also illiquid in another respect, as without extraneous evidence it was not possible to arrive at the exact time when the purchase took effect, when *rent* ceased and interest became payable from defendant to plaintiff.

Provisional sentence granted on the first three documents, and refused on the fourth.

[Plaintiff's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

In re ORPEN ET UXOR.

Antenuptial contract.—Domicile.

The Court refused to order the enregisterment of an antenuptial contract, where the parties were not at the time domiciled within the Colony and had no immovable property therein.

1856. April 12. July 12.

In re Orpen et Uxor.

Application for an order on the Registrar of Deeds to enregister an antenuptial contract excluding community of

* But see *Somerset* vs. *Maynier*, 1 Menz., p. 35.—ED.

applicant and his wife, domiciled and lately married in the Orange Free State.

1856. April 12. July 12.

In re Orpen et Uxor.

The application stood over for the purpose of ascertaining whether either husband or wife possessed any property in the Colony.

Postea (July 12),—

The affidavit of applicant was produced, to the effect that he had trifling articles of movable property and also debts within the Colony.

Porter, A. G., for the applicant, stated that it was desired that the antenuptial contract should be registered in contemplation of a possible future residence within the Colony.

THE COURT held that the parties having neither their domicile nor any immovable property within the Colony, they were not entitled to the registration of their antenuptial contract. If at some future time they might have their domicile within the Colony, or acquire immovable property, the registration of the contract could then be effected.

FORBES, STILL & CO. *vs.* SUTHERLAND.

Appeal to Privy Council.—Charter of Justice, § 50.—*Rules of Court* 37, 38.

Appeal to Privy Council disallowed on motion by respondents, where the petition for leave to appeal had been lodged with the Registrar within fourteen days, but appellant had not entered into recognisances to prosecute the appeal within three months.

1856. July 12.

Forbes, Still & Co. vs. Sutherland.

Petition for leave to appeal from the judgment in this case, delivered on March 5, was lodged by defendant within the fourteen days required by Rule 37. The defendant having omitted to enter into the necessary recognisance to prosecute the appeal within three months.

Porter, A. G., for plaintiff, moved that the appeal be disallowed.

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Forbes, Still & Co. *vs.* Sutherland.

Denyssen, for defendant, admitted that the requisites of Rule 38 had not been complied with, but contended that under the terms of the Rule it was still in the discretion of the Court to allow the appeal.

THE COURT, on reference to § 50 of the Charter of Justice, which directs that "if such security shall be entered into within three months from the date of such petition, then *and not otherwise* the said Supreme Court shall allow the appeal," granted the motion disallowing the appeal.

[Applicants' Attorneys, J. & H. REID.
Respondent's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

VAN DER POEL *vs.* COLYN.

Will.—Prohibition of alienation.—Action by mortgage creditor to effect sale of immovable property prohibited to be alienated "extra familiam."

Property over which there was a mortgage bond was bequeathed to C. for a fixed sum, with a prohibition of alienation "extra familiam," or for less than such fixed sum. Upon testator's death, C. took over the mortgage bond and paid the specified sum into the estate. Upon C.'s insolvency the mortgagee claimed that the property should be sold to satisfy arrears of interest. All those interested under the will, including a curator-ad-litem appointed on behalf of unborn issue, were unwilling to take over the property for the sum specified, it having considerably deteriorated in value. THE COURT *held the prohibition of alienation void, and ordered the property to be sold.*

1856. Aug. 5.

Van der Poel *vs.* Colyn.

In this action the defendants, Lambert J. Colyn the younger, C. J. C. Gie in his capacity as trustee of the insolvent estate of J. N. Colyn, R. P. Dobie and another as tutors testamentary of A. and J. N. Colyn, minor children of L. Colyn, deceased, and J. H. Brand as *curator-ad-litem* for the possible future issue of the insolvent J. N. Colyn, were summoned to answer J. Van der Poel, an hypothecary creditor of the insolvent, under the following circumstances:—

On April 26, 1836, the late L. M. Colyn, born Coetzer, widow of Lambert J. Colyn, previously deceased, who was the owner of the wine-farm and residence "De Hoop op Constantia," made her last will. In this she recited in part a mutual will, made by her and her deceased husband married in community, whereby the testators did "legate and bequeath" to their son, J. N. Colyn (now insolvent), amongst other things, "De Hoop op Constantia" for a sum of 100,000 guilders, with a proviso that the legacy should only take effect after the death of the survivors of the testators; and further, that the place was left with the express condition "that the said J. N. Colyn should never alienate or sell this estate, much less dispose thereof by will, but in behalf of his male children, failing which, in behalf of his brother Lambert J. Colyn, and he likewise then not being alive, in behalf of his the said Lambert J. Colyn's male descendants, and then never for more than a sum of 100,000 guilders, so that the estate 'De Hoop' should always devolve for that price on the male descendants bearing the name of Colyn, and, if possible, descending in a direct line."

The testatrix died on October 8, 1839. At this time the estate "De Hoop" had been specially hypothecated, both by the testator and the surviving testatrix, by six different mortgage bonds for six capital sums amounting together to £2326 16*s.* 3*d.* It was arranged between J. N. Colyn the legatee, now insolvent, the holders of the mortgage bonds and the executors of the estate, that the holder of two of the bonds in question, the late S. S. Van der Poel, should satisfy the other holders of the bonds, and that transfer should be effected by the executors to the legatee, he taking over the burden on the property and executing a mortgage bond in favour of S. S. Van der Poel for £2500, being the amount of the six bonds with interest at that date. In this manner the price fixed in the will, 100,000 guilders, or £2500, was paid and satisfied by the legatee to the estate of his parents. Accordingly, on April 21, 1840, the executors gave transfer to J. N. Colyn of the estate acknowledging the receipt of the £2500, and on the same day Colyn executed a mortgage bond in favour of S. S. Van der Poel for the £2500, hypothecating "De Hoop," and binding generally his person and property.

On September 10, 1852, S. S. Van der Poel died, leaving

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plaintiff her sole heir and executor, and he became the lawful holder of the bond. On December 12, 1855—the bond being then wholly unpaid—J. N. Colyn surrendered his estate as insolvent, and defendant Gie was appointed trustee.

The plaintiff's declaration alleged "that the place in question had fallen in value, and that the said J. N. Colyn, before his insolvency, being willing and desirous to transfer the same to defendant, Lambert J. Colyn, who according to the will is the person next entitled thereto, for the sum of £2500, applied to him to accept the same, but that he refused so to do, renouncing and rejecting for ever the *fidei commissary* legacy or inheritance to which he was entitled; and further that the several defendants who represent minors and children possible, but unborn, also renounced and rejected the said legacy or inheritance, knowing, as the fact and truth are, that, owing to changes in the wine-trade of this Colony, and other causes, the place is not worth the sum which each successive taker under the will is required to pay into the estate of the last preceding tenant for life."

On this state of facts, plaintiff submitted:—

1st. That inasmuch as the bond of £2500 is composed of and represents mortgages on the place "De Hoop" older than and preferent to the operation and taking effect of the wills, which older and preferent mortgages were settled and discharged by the money forming the consideration of the bond of £2500, the plaintiff is lawfully and equitably entitled to claim that the place should be sold free and discharged from the *fidei-commissum*, in case it should be found that it will not otherwise realise sufficient to satisfy the mortgage.

2nd. That even if he were not on the above grounds entitled to make this claim, and were obliged to make the claim through the estate and interest of the insolvent in the place, and not paramount to it, that in that case he is entitled to claim that the defendant Lambert J. Colyn and the other defendants who represent minors and children possible, yet unborn, should elect whether they will, in order of succession, accept or reject the place on the terms specified in the wills, and in the event of their rejecting the same (seeing the same is not now worth £2500, and is constantly declining in value), then that the said place

should be declared to belong to the insolvent estate of the said J. N. Colyn, and be subject to be sold in satisfaction of the plaintiff's mortgage bond, so far as the proceeds will suffice for that purpose.

The plea admitted the allegations in the declaration, and stated that defendants were ready and willing to act according to the decree of the Court.

For the plaintiff the evidence of three appraisers was produced, who stated that if the property were sold, irrespective of any condition or limitation, the utmost it would bring in the market under the most favourable circumstances would be from £2000 to £2200. Lambert J. Colyn, who according to the terms of the will was the next in order after the insolvent, entitled to the property, stated that the place had been offered to him for £2500 but that he had rejected the offer, this sum being far beyond the value.

Porter, A. G., for plaintiff, referred to *Van der Poel's Executors* vs. *Marais* (2 Menz., p. 360), and maintained that the debt due to the plaintiff and secured by the property, being in effect the identical debt for which the property was burdened, at the death of the testatrix, the sole distinction being the change of the form of the bond, rendered necessary by the transfer, and the interposition of the name of the insolvent as the owner of the place instead of the name of his parents, the plaintiff as the holder of the bond was entitled to demand that the property mortgaged should now be sold in satisfaction of this mortgage, notwithstanding the conditions of the will, by which the property was prohibited from being alienated, except on certain terms within the family. Further with regard to the second prayer, that the terms of the will gave the insolvent a life-interest for which he had paid, as required, £2500; that by law, a fiduciary heir in possession might anticipate the period when he should render the property held by him as fiduciary to the *fidei commissaries* (*Voet*, 36–1–34), and that therefore J. N. Colyn, and now his trustee, were entitled to call upon Lambert Colyn to take the property on payment of the £2500, and on his refusal, or the other defendants as representing minors and children yet unborn, who might have an interest in this entail, and none being prepared to take the property in fulfilment of the conditions of the will,

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but all, in fact, repudiating, *Voet* (36–1–65), the property should be released from the condition imposed on it, and be sold for the benefit of the insolvent estate, and of the plaintiff the preferent creditor. Further that according to the terms of the will, the insolvent might at any time after his adiation have offered the property for sale at £2500; and—no one of those entitled after him being prepared to take the property on the required conditions—the plaintiff, as interested in the property, would be justified in claiming that it should be sold free of all burden of this nature, to satisfy his mortgage.

Brand, J. H., appeared for defendants.

THE COURT held that in accordance with his first prayer, the plaintiff was entitled to demand that the place "De Hoop" should be sold, notwithstanding the terms of the will, in satisfaction of the mortgage of £2500 to plaintiff, this mortgage having taken the place of the mortgage which existed on the place before the insolvent took transfer in the terms of the will. It was in fact a burden on the place imposed by the testators, which could not be relieved without sale of the property, and it therefore rendered the prohibition of alienation in the will void. (*Voet*, 36–1–62; *Sande de Prohib. Alien.* 3–8–8.) The Court gave no opinion on the second prayer as to plaintiff's right to call on the guardians of minors to accept or repudiate.

[Plaintiff's Attorneys, REDELINGHUYS & WESSELS.
Defendant's Attorneys, J. & H. REID.]

HEUGH & FLEMING *vs.* THE HIGH SHERIFF.

Action against Sheriff for negligence in execution of writ.

Where, owing to the negligence of the Deputy-Sheriff and his messenger, goods were not attached under plaintiffs' writ, which were available in satisfaction thereof, judgment was given against the Sheriff for the amount which he had failed to recover through such negligence.

1856. Aug. 7.

Heugh & Fleming *vs.* The High Sheriff.

In this case the High Sheriff was summoned in action by the plaintiffs for recovery of the sum of £243 8*s.* 8*d.* under the following circumstances:—

On August 10, 1854, plaintiffs recovered provisional sentence against one Werdmuller of Burghersdorp for the sum of £579 13*s.* 8*d.* with interest and costs. On the same day a writ of execution was taken out. On this writ £313 16*s.* was levied, and the Sheriff's return was made to that effect on February 13, 1855. After this an *alias* writ was sued out by the plaintiffs, deducting the £313 16*s.* "without prejudice to the plaintiffs' right to hold the defendant liable for his deputy's neglect in not having levied the whole amount under the previous writ. On this second writ the sum of £23 16*s.* 6*d.* was levied, leaving a balance of £243 8*s.* 8*d.* due, which was claimed from defendant on the ground that the whole might have been recovered under the first writ, but for the neglect, default, and misconduct of defendant by his deputy. From the evidence taken before CLOETE, J., at the Burghersdorp Circuit Court, it appeared that the Deputy-Sheriff had omitted to attach a large quantity of Werdmuller's goods; that the inventory was very loosely and negligently taken by his messenger; that after the attachment and Sheriff's sale on the first writ in August, 1854, and before the second had been sued out in May, 1855, Werdmuller had by public auction and private sale disposed of goods, which were in his stores at the time of attachment and inventory, to the amount of £187 10*s.*

Porter, A. G., for plaintiffs.
Brand, C. J. (with him *Denyssen*) for defendant.

THE COURT gave judgment for the plaintiffs for £200 with costs.

[Plaintiff's Attorney, J. H. HOFMEYR.
Defendant's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

De Villiers *vs.* Du Toit.

Endorsement.—Cession of debt.

A. being in difficulties in October, 1848, *ceded a mortgage bond for* £625 *to B. and obtained in return therefor* £400 *in cash and an acknowledgment of debt for* £225 *by one K., dated January,* 1847, *containing a promise to pay within a year. B. endorsed this upon handing it over to A. A. caused the note to be presented to K., who promised to pay, and some time after did pay part of the* £225 *to A., but in January,* 1850, *K. surrendered. A. sued B. for the balance of the note.* Held, *that the document had been handed over as cash, and A. could not succeed.*

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This was an action brought to recover the sum of £117 10*s.* 10*d.* with interest on a certain acknowledgment of debt. The case was removed by Cloete, J., from the Beaufort West Circuit Court to the Supreme Court for argument.

The facts were as follows:—In October, 1848, the plaintiff, G. F. De Villiers, being in want of money to satisfy a judgment of £400 against him, applied to the defendant A. Du Toit for a loan, and the latter in consideration of a mortgage-bond for £625 passed by one Kok in favour of the plaintiff, specially binding a farm called "Taaiboschfontein," which had been purchased by Kok from the plaintiff (the bond bearing date September 14, 1848, and being payable on July 15, 1853), advanced to the plaintiff £400 in cash and an acknowledgment of debt, made by Kok in defendant's favour, for £225, of the following tenor:—

"I the undersigned acknowledge to have taken at interest, from Mr. A. G. Du Toit, the sum of 3000 rds. for the period of one year from this date, the interest at 6 per cent. per annum.

"I promise to pay the above-mentioned sum one year after date with interest. "(Signed) J. A. Kok.

"*Nieuwveld,* January 15, 1847."

On the back was written:—

"Interest received for the year 1847.

"(Signed) A. G. Du Toit."

And when the document was handed to the plaintiff together with the £400, defendant endorsed it "A. G. Du Toit."

The bond of £625 was ceded by the plaintiff to the defendant in the following terms:—

"Ceded and transferred this mortgage in favour of Mr. A. G. Du Toit this 1st November, 1848, at Ratelfontein.

"(Signed) G. F. De Villiers."

And the plaintiff further gave the following receipt to defendant:—

"Received this day from Mr. A. G. Du Toit, the sum of £400 in cash, and £225 in an acceptation against J. A. Kok, and have handed and ceded to the said A. G. Du Toit a mortgage bond of £625 and promise further again to release said mortgage bond before the expired time if such be required. "(Signed) G. F. De Villiers.

"*Ratelfontein*, November 1, 1848."

The plaintiff having Kok's note for £225 in his possession on January 15, 1849, caused it to be presented to Kok, when he was informed by Kok that he was about to hold a sale, when he would pay him. A few days after this a sale was held by Kok of half his stock, which realised £113 14*s.* 9*d.* The plaintiff however received at that time no portion of the capital from Kok, but on January 18 received the interest, endorsing the receipt of such interest on the note. The plaintiff continued to hold the note, and after this received a promissory note of Devenish, in part payment for 143.6.64 rds. or £107 0*s.* 2*d.* due August 18, which was paid when due.

On January 25, 1849, plaintiff wrote to defendant that Kok had sold the farm "Taaiboschfontein," in consequence of which the bond which was due in 1853 would shortly have to be liquidated. On April 18, 1849, he wrote to him again, apparently in reply to a letter claiming the performance of his promise to take up the bond, and undertook that it should be paid shortly. In this letter he also informed him "I have nothing yet from Kok, and it is still in danger." The bond was after this paid to the defendant; but after the plaintiff had received the £107 0*s.* 2*d.* on Kok's note he received nothing more, and on January 24, 1850, Kok surrendered.

The plaintiff now sued defendant for the balance still due on Kok's note.

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Denyssen for the plaintiff maintained that on non-payment by Kok to defendant of the entire amount of the debt which he owed on this acknowledgment, the plaintiff was entitled to claim the amount still due from defendant; and that defendant by his endorsement entered on the obligation to make such payment.

Porter, A. G. (with him *Brand, J. H.*) argued that the note had been received as cash, and that the writing of his name by defendant on the back signified a cession of his right in the debt due to him, to the plaintiff; the plaintiff being entitled to write such cession over the signature. That the defendant's whole conduct shewed that he considered himself absolute owner of the acknowledgment which he had so received as cash; that if on any principle the defendant could ever have been considered liable to the plaintiff in respect of this document, the latter's want of diligence against Kok would have exonerated the plaintiff from the present claim.

THE COURT held that Kok's acknowledgment had been delivered over to the plaintiff by the defendant as cash; and that a transfer of this note not payable to order, was to be looked upon merely as a cession of the debt due by Kok from the defendant to the plaintiff, which cession, by law only guaranteed that, at the time, such a debt actually existed, but did not at all guarantee the solvency of the debtor. The risk of Kok's ability or inability to pay the note was taken by the plaintiff when he took over this acknowledgment from the defendant. (*Voet*, 18–4–14; *Pothier on Obligations*, § 568, 569.)

Judgment for the defendant with costs.

[Plaintiff's Attorney, J. H. HOFMEYR.
Defendant's Attorneys, FAIRBRIDGE, HULL & MEINTJES.]

Reid *vs.* Van der Walt.

Slander.—Prescription.—Pleading.—Onus of proof, as to knowledge of slander by plaintiff, for one year without proceeding.—Evidence.

The action of damages for slander is prescribed if not brought within one year after knowledge of the slander on the part of the plaintiff.

The onus of pleading and proving that the plaintiff was aware of the slander for upwards of a year after it was uttered and that he failed to proceed, rests on defendant.

It is necessary in action of slander that the words spoken shall be in evidence in the language in which they are alleged in the declaration to have been uttered.

Where the words spoken were alleged in the declaration to have been spoken in Dutch and it appeared from the evidence taken on commission that they were so spoken, but upon the evidence the words only appeared in English: Held, *that the defendant was debarred from raising this objection at the trial, as he should have claimed that they should be taken down in Dutch, by the Commissioner.*

1856. Aug. 28. — Reid vs. Van der Walt.

This was an action of slander brought by the plaintiff, late Minister of the Dutch Reformed Church at Colesberg, against the defendant, resident in that division.

The declaration set forth that the alleged slanderous words were spoken about the years 1852 and 1853, and they were set out therein in the Dutch language; the words imputed theft, perjury, and drunkenness to plaintiff; the declaration alleged that the slanderous words did not come to plaintiff's knowledge till within one year before commencement of suit.

The defendant excepted that the plaintiff took no notice of the words spoken for more than a year afterwards, and annexed the letter of demand written in 1854. The defendant further pleaded the general issue, and that the alleged slanderous words were known to the plaintiff for more than a year before he took steps, and that the action was

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therefore barred by prescription. Further, that a notarial bond was entered into between plaintiff and certain members of his congregation, of whom defendant was one, by which all differences existing between them were agreed to be settled for £1,000 paid to plaintiff: that plaintiff agreed to resign his office: and that defendant had paid his proportion of the £1,000.

Denyssen (and *Brand, C. J.*) appeared for plaintiff.
Porter, A. G. (with him *Brand, J. H.*) for defendant.

THE COURT (BELL and CLOETE, JJ.) held that in an action of damages for slander, the law being that such action is prescribed if not brought within a year after knowledge of the slander on part of the complainant, it is not incumbent on the plaintiff, bringing his action after the year, to prove that the slander did not come to his knowledge until within a year after the commencement of suit, but it is incumbent on the defendant to plead and prove as matter of defence that the plaintiff was aware of the slander for upwards of a year after it was uttered and yet failed to proceed. (*Grotius*, 3–35–3, note 6; *Voet*, 47–10–21.) [CLOETE, J., pointed out that the action *ad palinodiam* is not so prescribed.]

The evidence was taken on Circuit before a Commissioner, and the words in proof appeared therein in English only.

Porter, A. G., objected that inasmuch as the declaration alleged that the slander was uttered in the Dutch language, there was an absence of all proof that the words alleged were ever uttered, for it did not appear what the words alleged to have been spoken were. As it is undoubted law that the declaration should set forth the words in the language in which they were uttered (*Zenobio* v. *Axtell*, 6 T. R. (D. & E.) p. 162), it is equally necessary that the words in the language in which they are alleged shall be in proof.

THE COURT held, admitting the law quoted to be correct, the defendant was not now entitled to take this objection, as it had been in his power, before the Commissioner, to claim that the words should be taken down in the Dutch language, as well as through interpretation in the English language—

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it appearing sufficiently in the evidence as taken, that the words were spoken in Dutch as alleged in the declaration. Further, that the bond given at the suggestion of the Graafreinet Presbytery by the dissatisfied portion of the congregation as an inducement for plaintiff to retire, did not take away plaintiff's right of action for slanders uttered by defendant or others.

Defendant's counsel then consented to a judgment for plaintiff for 20*s.* with costs.

[Plaintiff's Attorney, W. E Moore.
Defendant's Attorney, J. H. Hofmeyr.]

Trustees of the Walwich Bay Company *vs.* Collector of Customs.

Shipment of gunpowder in bond.—Ord. 2, 1853, §§ 2, 3.

By Ord. 2, 1853, § 3, *it is provided that no shipment of gunpowder shall take place to any port of Africa, within or without the Colony, without the Governor's permission.* Held, *that the Governor had not the power to impose upon the shipment of gunpowder the condition that a certain duty should be paid.*

1856. Sept. 2. Trustees of the Walwich Bay Co. vs. Collector of Customs.

This was an action to recover the sum of £50 paid under protest.

The declaration alleged that on August 10, 1855, the Walwich Bay Company, having purchased 2000 barrels of gunpowder in bond from one Landsberg, "applied to defendant for leave and permission to have this gunpowder exported fron the bonded warehouse free of duty to Walwich Bay, a foreign port, on the usual form of export entry, which application the defendant refused and declined to allow, unless upon payment of an export duty thereon of sixpence per pound weight: that the gunpowder being required by them for mining purposes, they paid the sum of £50 as duty under protest, which sum they now claimed back with costs."

The defendant pleaded the general issue, and further (without waiving his right under Ord. 6, 1853, § 66, to give

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special matter in evidence under the general issue), that by Ord. 2, 1853, § 2, which Ordinance by Act 5, 1854, was continued in force until the end of 1855, it is enacted "that no gunpowder should, at any port or place within this Colony, be shipped on board any ship or vessel in order to be carried to any port or place whatsoever, whether in Africa or elsewhere, without the permission in writing of H. M. Chief Officer of Customs at such port, first had and obtained," and that by § 3 it is enacted that the application shall be in writing, and that "no such officer of customs shall grant such permission to ship gunpowder to any port or place in Africa, until he shall have transmitted such written application, with his report thereon, to the Governor of the Colony, and shall have received the Governor's authority to grant the permission sought. And further, that the Walwich Bay Company by their secretary on July 27, 1855, applied for permission to ship in bond to Walwich Bay (which is a port or place in Africa), on board a vessel called the *Witch of the Wave*, then in Table Bay, 2000 lbs. weight of gunpowder, which application the defendant on the same date transmitted with his report to the Governor for his consideration. "And the defendant further saith that the Governor was pleased not to grant his authority to the defendant (who is the chief officer of customs in this Colony) to give the permission authorising the shipment in manner and form as desired by the Walwich Bay Company, but was pleased to empower the defendant to give the permission in case the Company should desire to ship gunpowder on which the ordinary duties should have been paid": and thereupon the Company paid the ordinary customs duty of 6*d.* per lb., and the defendant acting under the Governor's authority gave the permission required by law to authorize the shipment, the customs duty so paid being the same money in this action sought to be recovered. And further that the statement of plaintiffs at the time of payment, that it was made under protest, did not, under the circumstances of the case, give the plaintiffs any right of recovery which they would not have had, if the payment had not been so made by them under protest. [This latter point was not pressed.] The facts were not in issue.

Correspondence was put in bearing out the matters pleaded in the third plea.

Brand, C. J., for plaintiffs.

Porter, A. G., for defendants admitted that Walwich Bay was a foreign port; that under the general customs' law there could be no question as to the right of parties to ship goods thither in bond free of duty; and waived the argument that the money having been paid with full knowledge of the law and facts is not recoverable; but relied on the special laws relating to gunpowder and fire-arms, giving the Governor an absolute discretion as to their export.

BELL, J.:—There is under the general law regulating the character of Cape Town, as a free port, a provision that goods may be placed in bond and exported, as a right, without permission of any person: therefore it is not necessary to refer to Ord. 6, 1853, sect. 33, under which that is provided. The question here is under Ord. 2, 1853, referring back to Ord. 5, 1851, which is a special law regulating the trade in a particular article, and the preamble of that law is [His Lordship here read the preamble and sect. 2, and continued:] There is no distinction here made as to the powder being in bond or being duty paid. It says that no gunpowder whatever shall be shipped to any part of the world without the permission of the Collector of Customs. But by § 3 it is enacted that if the shipment is intended to any part of Africa, whether within or without the Colony, it shall be necessary for the Collector of Customs before authorising the shipment to obtain the permission of the Governor. Now it is upon the words of this section that the present question has arisen. The policy of the Act was to prevent arms and ammunition being conveyed to the enemies of the Colony beyond the frontier. Under the Act there was an application to ship gunpowder lying in bond, duty unpaid, but it might have been as well for gunpowder, duty paid; and the Governor gave permission to ship it, qualified with the condition that duty should first be paid upon it. The objection taken to this is, that the Governor thereby assumed a power to levy a duty without the authority of Parliament, because no power has been given to the Governor by Parliament to levy a duty on articles exported for use beyond the Colony, and there is no doubt a great deal in that argument. But it appears to me that the true decision of the case rests

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on the ground taken in the defence that there is an absolute discretion in the Governor to permit or refuse the exportation of gunpowder to ports in Africa within or without the Colony with which no one has a right to interfere. That I freely admit. But what the plaintiffs are contending for is, that there has been a power exercised in this case which the Legislature has never given. It is one thing to say that the Governor may prevent or allow the exportation, and another to say that he may allow with a qualification; for what is to limit him as to the extent of qualification? It is said that he might impose a condition with regard to quality, as that none but fine powder should be exported,—or he might make the permission with regard to the place from which it should be exported, as only from Mossel Bay or Algoa Bay. Now I do think those would be conditions within the letter and spirit of the enactment, and consistent with its policy. But His Excellency might impose conditions which are beyond mere shipment,—such as payment of duty,—he might impose other qualifications of a very different nature, capricious, unreasonable, and, what is more to the point, impolitic, that is, opposed to the policy of the enactment. All that the Act has said is, that the Governor in his absolute discretion shall refuse or permit. Then the argument is used, the exporter will foresee that the Governor will refuse the export of gunpowder on which duty has not been paid, and will ask permission to export that on which duty has been paid, and thus duty will be obtained, though in a different way. With that we have nothing to do. It is argued further, if the Governor refuse absolutely the export, that foreigners will come in and supply the traders beyond the frontier, though in the argument it was stated that this has not yet occurred, and reasons are hinted at, with which however we have here no concern, why such a thing is not likely to happen; but if this were otherwise it would not alter the question whether permission is to be given only on payment of duty. What the Parliament has said is, "It is dangerous to allow gunpowder to go beyond the boundary, and therefore we will put in the Governor's hands an absolute discretion to refuse or permit it in any given case." The Parliament has conferred on him the power of saying, without the power being in any one to question it or ask his reasons, "Enough has gone beyond the boundary, I will not permit more"—or

on the other hand to say, "Enough has not gone, more may go," or to consent or refuse without assigning any reason. But it is evident that it would put it in the power of the Governor to multiply the statute, though acting with perfect *bona fides*, and without the possibility of any one impeaching him, or of calling his conduct in question in Parliament, as was suggested by defendant's counsel, if he might impose conditions upon his permission, for then he in effect proceeds to legislate anew and to entertain in his mind questions which, by his solution of them, might be quite opposed to the policy of the statute and destructive of its enactments. The Court has only to construe the Act, without reference to its policy or impolicy; but, if we were to deal with the question of policy, it is quite clear to me, that if such a power of annexing conditions rested in the Governor, it is probable that the Governor, though not probable that the present Governor, might do that which would upset the very object which was in view of the Legislature. The imposition of duty happens to be the condition that was imposed, but it might have been of a totally different nature. But it is not for the Court to go into that question. All we have to do is to attend to the words which have been used. It appears to me, under the terms used, the Governor has power to refuse, entirely and absolutely, any application for leave to export gunpowder to any port of Africa beyond the Colonial boundary, and he has alone the power to consider whether he should allow it when the duty has been paid, or refuse it when it has not been paid, if in the given case he should find it so, and that in this way he can regulate the trade and prevent any external interference: for nobody can ask his reason for consenting or refusing, whether because the duty in the first case has been paid, or, in the second, has not been paid. He is not bound to give any reason to any one for what he does. If he found it necessary to prevent the exportation of gunpowder, he could do so by refusing all permission. If on the other hand he thought it necessary to allow permission for no more than a certain quantity, he can do so. It is entirely in his hand to regulate the extent of export of the article, but it is not in his power to add any qualification which may raise other questions than export or non-export. He must, as it appears to me, allow or refuse directly and simply.

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CLOETE, J.:—This is an action in which the Managers of the Walwich Bay Mining Company seek to recover back £50 duty paid on a certain quantity of gunpowder, shipped by them to Walwich Bay, and which duty they were induced and indeed compelled to pay, on the demand of the Collector of Customs, to obtain the gunpowder, and which payment they made under protest. In considering the merits of this action, I fully concur with what my brother Judge has just laid down, that it is our mere duty to look whether this demand has been made by the Collector of Customs by virtue of any existing law, and that unless it be shown that there is such a law, the plaintiff is entitled to demand the amount so paid by him. It has been at once admitted by defendant's counsel that under the general Act this is a free port, from which goods may be exported without payment of duty, to any part of the world, and that Walwich Bay is as much a free port as Amsterdam. But it is said for the defendant, that under the express provisions of § 3 of Ord. 2, 1853, which has been continued to remain in effect until the end of 1857, gunpowder is an article specially excepted. By looking at the preamble of this Act, we find that owing to the state of warfare by which we were surrounded on our borders, the Legislature determined to make a stringent exception of this article; and it was therefore enacted that any person wishing to export gunpowder to any port in Africa, "shall apply in writing to the Collector of Customs, stating the particulars of the articles required, and no such officer of Customs shall grant any such permission until he shall have transmitted such written application, with his report thereon, to His Excellency the Governor, and shall have received the said Governor's authority to grant the permission sought." These words therefore we are called upon to interpret, and to adjudicate upon on the following simple fact, that the plaintiffs having made renewed applications to export a larger quantity of gunpowder to Walwich Bay, situate beyond the boundaries of the Colony, the Collector of Customs admitting that although all other articles might be exported "duty free" to Walwich Bay, yet, in regard to this prohibited article of gunpowder, thought that a duty as for "home consumption" might fitly be laid upon it, to acquire the liberty of exporting. And the Governor, upon the representation of the Collector, was

induced to direct that this article should not be exported in future unless a duty were paid. Now I am obliged to demur to the doctrine boldly laid down by the Attorney-General, for the defendant, in respect of this transaction, when he stated that the Legislature intended to and did confer on the Governor certain dictatorial powers, as in the days of Rome, when powers were given to dictators to do anything they thought expedient for the safety of the commonwealth, only subject at the expiration of their dictatorship to the censure or impeachment of the senate. Now I think the Legislature never could have intended to give, nor did they give, such a wide discretion to any one branch of the Legislature, but that it only gave the Governor a right of *permission* or a right of *veto*, if our borders were threatened during the time, but that he has not a discretion to make this a right of traffic or negotiation, or to alter the general laws regulating customs, and to make this article pay either sixpence or one shilling or ten shillings per pound—the Act not reciting any terms as the following: namely, to grant the Governor power to allow the exportation "on such conditions as he may from time to time impose." If we once admit the principle contended for by the defendant, it is clear that His Excellency may be supposed warranted in imposing any duty whatever, although no reference to duty is to be found in the Act. I am ready to admit that the imposition of the ordinary duty as for home consumption may be considered as fair, with reference to the object for which the gunpowder was required. But in this case we are restricted to consider whether the defendant has shown any law justifying the levying of such a tax on those articles exported; and in this his counsel has altogether failed. It is clear that if the Legislature had intended to give the power of altering or modifying or imposing any tax under this Ordinance, some clause to that effect should appear, and if it was really intended, the sooner the defect be remedied the better; but so long as this Act remains in force, and in the words which now set forth the object of the Legislature, we can only look at it, to declare whether, under this law, any functionary in this Colony has the power to impose such a tax on any article placed in bond and exported to places beyond the limits of the Colony. On these grounds I quite concur in the judgment that the

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plaintiffs have a right to recover back the amount they have paid under protest.

Judgment for plaintiffs with costs.

[Plaintiffs' Attorneys, FAIRBRIDGE, HULL & MEINTJES. Defendant's Attorneys, J. & H. REID.]

MEINTJES & DIXON *vs.* DEARE & DIETZ.

Sale.—Acceptance.

Plaintiffs, merchants at Graafreinet, by their agent G. bought gunpowder in kegs from defendants: the sale took place on Jan. 3 *at Port Elizabeth: no sample was given and no inspection made, but the defendants represented the powder to be good: on* 17*th delivery was made to G., who sent the powder to plaintiffs: the latter received it on* 31*st, and gave a promissory note at six months for the price, which was paid when due. On February* 20, *plaintiffs sent some of the powder to Richmond, and on being opened it was found to be damaged from wet, and worthless: the plaintiffs gave notice of this to defendants: subsequently the rest of the powder was found to be damaged: the carrier's evidence was that the powder was in each case delivered in the same condition as received: the plaintiffs claimed a return of the purchase price and expenses.* Held, *that the powder was accepted at Port Elizabeth, that the plaintiffs had allowed a reasonable time for the examination thereof to elapse, and could not therefore succeed.*

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The plaintiffs, merchants at Graafreinet, claimed from defendants, merchants at Port Elizabeth, the sum of £210 16*s.* 7*d.* as damages for breach of contract.

The circumstances of the case according to the evidence were as follows:—The plaintiffs, through their agent, one Green, at Port Elizabeth, purchased forty-two kegs of gunpowder from defendants on January 3, 1853, for £115 12*s.* 9*d.* The whole of the gunpowder was delivered to Green on January 17, 1853, and sent off by him to Graafreinet on the

same day. The gunpowder was represented by defendants to be good, but no sample was given, nor was any keg opened or any powder inspected. At the time of purchase the powder was stated by defendants to be covered with gunny-bags, but that delivered not being so covered, the defendants at Green's request supplied bags, and the kegs being enclosed in them were delivered to the carrier for Graafreinet. The distinguishing mark of these kegs was P. & F. (Pakenham and Frames). The same carrier took other gunpowder of the plaintiffs marked W. & J. S. and A. J. At the time of the sale the defendants had in their possession other gunpowder covered with bags which was delivered by them to other persons between the 3rd and 17th, and the powder delivered by defendants on the 17th was purchased by them on that day from one Salmond, the agent of P. & F. The kegs were apparently sound, and according to Salmond's evidence, he sold the gunpowder as good coarse powder and a fair merchantable article.

The powder arrived at Graafreinet on January 31 and was stored there, being, according to the carrier, in the same state as delivered. On that date the plaintiffs gave their promissory note in favour of defendants for £115 12*s.* 9*d.* at six months, which was paid by them when due to the Cape of Good Hope Bank. On February 20, twenty kegs were sent to Colesberg; on March 16, six kegs were sent to Richmond, and reached those places, according to the carrier's evidence, in the condition in which they had received them. Of the twenty kegs taken to Colesberg, all of which were marked P. & F., some were immediately opened and found to be in a damaged and unsaleable state, having at some time previously got wet; a survey was held upon the powder, and it was condemned as unsaleable. Of the six kegs sent to Richmond some, marked W. & J. S., were found to contain good powder, and the only keg marked P. & F. was found unsaleable. The surveyor's certificates were forwarded at once to Green, who delivered them to defendants. After the sale to plaintiffs, Green purchased some more of the same powder from Salmond as agent of P. & F., but caused one or two of the kegs to be opened and examined before taking delivery: on finding the powder in lumps and in an unsaleable state, the sale was cancelled. On May 18, 1854, plaintiffs' attorneys wrote to defendants

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demanding payment of £210 16*s.* 7*d.*, being costs, expenses, &c. of gunpowder "sold by you to them as good gunpowder on January 3, 1853, but which was in fact damaged. Messrs. M. & D. being prepared to return to you or your agents, at your own cost, so many of the said barrels as remain on hand and to account to you for those sold." Summons was taken out on September 17, 1854.

Shortly before the trial the powder in question was again examined and pronounced by the surveyors unmerchantable, having at some time or other been damaged by being allowed to get wet. The amount claimed was made up of the purchase price of the powder, carriage, rent, &c.

Denyssen, for plaintiffs, maintained that the powder having been sold as good powder by defendants, and having been discovered shortly after the delivery to and the payment by the plaintiffs to be unsaleable, of which notice was at once given to defendants by plaintiffs' agent, the defendants were bound to make good to plaintiffs the price and all expenses incurred in regard thereto. The powder had been clearly traced, and the proof was irrefutable that it was in a damaged and unsaleable condition when delivered by defendants.

Brand, C. J. (with him *Cole*), for defendants, were not called upon.

THE COURT (BELL and CLOETE, JJ.) held that plaintiffs were not entitled to judgment. This was to be viewed as a mercantile transaction, in which the plaintiffs purchased from defendants without requiring a sample, and the powder was delivered and accepted at Port Elizabeth without any examination of its quality by either party. It was received into plaintiffs' possession at Graafreinet, and after its receipt the note was given in payment, no examination of any portion of the powder yet taking place. Only a month or two months after this, in consequence of the transmission to Colesberg, was any inquiry made about the quality of this powder by plaintiffs, and then it was too late for them to open the transaction, which had been closed by acceptance and payment on their part. Even if, therefore, the Court found on the evidence that actually no injury had been suffered by this powder after it passed from Port Elizabeth through the several carriers to the different storekeepers

(which, however, they did not find as a fact), on the principles applicable to the decision of mercantile transactions of purchase and sale, the plaintiffs could not be held entitled to recover. They had allowed a reasonable time for the examination of the powder to elapse, and must suffer for their neglect.

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Judgment for defendants with costs.

[Plaintiffs' Attorneys, FAIRBRIDGE, HULL & MEINTJES. Defendants' Attorney, D. TENNANT.]

DE VILLIERS, TUTRIX OF WEHR *vs.* SOUTH AFRICAN ASSOCIATION, EXECUTORS OF WEHR.

Collation.—Will.

W., married in community, by will made in 1852, *directed that a certain sum due to him by his son should be brought into collation in estimating the inheritance due to his son: part of this debt was due on a bond made by the son, dated* 1834. *In* 1849 *the son became insolvent, and W. did not prove the bond in his estate, though he proved other debts: in* 1853 *W.'s wife died, and no notice was taken of the bond in ascertaining the amount of the maternal estate due to the son: in* 1854 *W. died. The son's widow claimed against W.'s executors that the bond should not be brought into collation, as there was proof of cancellation.* THE COURT *gave judgment for defendants.*

1856. Sept. 4. De Villiers, Tutrix of Wehr *vs.* South African Association, Exors. of Wehr.

The plaintiff, widow of the late J. Wehr, jun., as tutrix testamentary of his minor children, claimed that the defendants, executors testamentary of J. Wehr, sen., should be ordered to amend the distribution account of the estate administered by them, by not bringing into collation against the share of inheritance devolving on his son, the late J. Wehr, jun., the sum of £3750. The testator died in 1854, and by his will dated March 6, 1852, directed that the sum of £5353 due by his predeceased son, J. Wehr, jun., should be brought into collation in ascertaining the amount of inheritance coming to him; this sum consisted

1856. Sept. 4.

De Villiers, Tutrix of Wehr *vs.* South African Association, Exors. of Wehr.

of £3750, amount of a debt due by a bond dated Amsterdam, January 15, 1834, and of other items.

The plaintiff alleged that the testator in his lifetime, and more particularly in 1849, about the time of her husband's death, had foregone and annulled his claim to this sum of £3750 which had been advanced originally for the purpose of setting up his son in mercantile business, and had been lost through misfortune; and therefore claimed that in ascertaining the share of inheritance coming to this son and now devolving on his children, this sum of £3750 should, notwithstanding the will, not be brought into collation. In proof of the cancellation of the debt, it was adduced that on the death of the testator's wife, the mother of J. Wehr, jun., in 1853, in ascertaining his share of the maternal estate, no notice was taken of this debt (although she and the testator were married in community); and also that when after the death of J. Wehr, jun., in 1849, his estate was surrendered as insolvent by his executors, the testator proved upon his estate for debts due on promissory notes, &c., but did not prove this amount.

The estate was still uncertificated: it was further proved by the evidence of the plaintiff that about the period of her husband's death in 1849, the testator had told her that he would forego the claim which he called the Dutch debt.

Dr. R. Wehr, the testator's eldest son, explained the circumstances under which the £3750 was advanced in 1834, viz., that it was understood between all parties interested that this amount was in anticipation of the inheritance which might devolve on J. Wehr, junior.

The defendant put in the bond of 1834, wherein J. Wehr, jun., acknowledged the debt of 50,000 Dutch guilders (£3750), and undertook that it should be paid out of his inheritance.

Brand, C. J., for plaintiff.
Porter, A. G., for defendants.

THE COURT gave judgment for the defendants. By consent, costs out of the estate.

[Plaintiff's Attorney, J. H. HOFMEYR.
Defendants' Attorneys, REDELINGHUYS & WESSELS.]

HAARHOFF *vs.* WIPPNER.

Provisional sentence.—Liquidity.

Provisional sentence granted for an instalment of the purchase price of land sold by written contract five years before, though transfer had not yet been effected; in the absence of evidence that the delay was attributable to plaintiff.

1856. Sept. 12. — Haarhoff *vs.* Wippner.

Provisional sentence was claimed for 1800 rds., or £135, as the third instalment of the purchase price of an erf in Graafreinet, sold by plaintiff to defendant by written contract of purchase and sale dated Jan. 21, 1851.

Among the stipulations in the contract were :—

1. The purchase shall take effect on Jan. 1, 1851.

2. The purchaser shall pay the purchase-money as follows:

4000 rds. or £300 in 1000 sheep already delivered to the seller.

1200 rds., or £90, on October 26, 1851.

1500 rds. on February 1, 1854.

1800 rds. on Feb. 1, 1856.

The purchaser to pay interest on the last two amounts, &c.

3. The purchaser shall pay the transfer dues, and the costs of giving and receiving transfer, and all that is necessary thereto.

4. The transfer shall take place so soon as the transfer dues shall be paid, and on the receipt thereof the purchaser shall pass acknowledgments of debt under mortgage of the erf in security of the unpaid part of the purchase-money—all at his own costs."

Porter., A. G., for the plaintiff.

THE COURT gave provisional sentence, although transfer, which by the terms of the contract might have been given long since, had not yet been effected in defendant's favour, on the ground that the agreement to pay the last instalment was a positive liquid undertaking to make the payment on February 1, 1856, not dependent upon the question whether or not transfer had been effected: but stated that if defendant had appeared and had shown that the delay in the transfer was attributable to plaintiff, provisional sentence would not have been granted.

[Plaintiff's Attorney, C. J. BUISSINNÉ.]

In re BENNINGFIELD.

Insolvency.—Practice.—Application for documents proved in an insolvent estate to be forwarded to England.

The Court granted an application by a trustee in an insolvent estate for an order upon the Master to deliver up certain liquid documents which had been proved in the estate, in order that proceedings might be taken upon them against the insolvent, who was resident in England and had assets there.

1856. Nov. 18. *In re* Benningfield.

This was an application for an order on the Master to deliver to the trustee in the insolvent estate of Benningfield certain original promissory notes and other liquid documents of debt, on which debts had been proved in the estate, and now forming part of the proceedings in the Master's office, for the purpose of enabling him to proceed against the insolvent, now residing in England, for their recovery. The insolvent had surrendered in 1840; two liquidation accounts were filed by the trustee but nothing awarded to concurrent creditors: after his surrender he had resided in Natal, but afterwards proceeded to England, where he was residing at the time of this application, and where he had property to a considerable amount.

Porter, A. G., for the applicant.

THE COURT granted the order as prayed.

BRINK *vs.* CLOETE.

1856. Nov. 26. Brink vs. Cloete.

For report of this case, see Buchanan, 1869, p. 215.

TRUSTEES OF THE SOUTH AFRICAN BANK *vs.* CHIAPPINI.

1856. Nov. 27. Trustees of the South African Bank vs. Chiappini.

For report of this case, see Buchanan, 1869, p. 143.

In re FINDON.

Insolvency.—Ord. 6, 1843, §§ 30, 117.—*Certificate.*

A creditor who puts a value upon his security under Ord. 6, 1843, *sec.* 30, *is only entitled to be reckoned as creditor for the unsecured balance, with regard to his consent to the granting of the insolvent's certificate under sec.* 117.

1856. Dec. 4. — *In re* Findon.

This was an application on behalf of Findon, an insolvent, for an allowance of his certificate under Ord. 6, 1843, § 117. The estate was surrendered in 1853: three creditors proved: Mechau, on a debt secured by mortgage bond, of £90, with interest, amounting to £104 16*s.* 6*d.*; Morris and Hertzog, concurrent creditors for £146 2*s.* 8*d.* and £4 respectively. Under Ord. 6, 1843, § 30, Mechau in his proof placed a value on his security, and stated in his affidavit that he was fully secured. By the first and final liquidation account £84 15*s.* 3*d.* was awarded to Mechau, leaving a deficiency on his claim of £20 1*s.* 3*d.*: nothing was awarded to the others. Morris signed a consent to the insolvent's discharge as required by sec. 117, but the other creditors did not sign. The Master thereupon refused to grant the certificate under sec. 117 that the consent of the creditors had been given by three-fifths in number and value, whereupon application for the certificate was made to the Court.

Porter, A. G., appeared for the applicant.

THE COURT held that according to the wording of sec. 30, Mechau had the right to vote for trustees and commissioners only for the full amount of his debt, but for all other matters, including the consent to the discharge under sec. 117, he was entitled to vote only for the balance after deducting the value put in the proof on the security which he held. In the present case the value put upon the security was the full amount of the debt, and therefore no balance existed in respect of which he had any vote for other matters than those specified in sec. 30. His signature to the certificate could not benefit and the absence thereof could not injure the insolvent in this application. By sec. 38 there is a

1856. Dec. 4. — *In re* Findon.

limitation as regards creditors under £30, who are not to be reckoned *in number* "in all cases of votes given by creditors," while the debts due to such creditors are to be computed in *value*. If, therefore, Mechau's proof of debt had been amended so that he appeared in the proof as entitled to vote for £20 1*s*. 3*d*., he would yet be in the same position as Hertzog—a creditor not entitled to be ranked in number. The only creditor, then, entitled to be ranked in number is Morris, who has signed the certificate, and the other debts being computed in value, the insolvent's certificate was signed by more than three-fifths in number and value, and therefore he was entitled to his discharge.

BROWN *vs.* VAN NIEKERK.

Sale.—Acceptance.—Measurement.—Tender.

Plaintiff sold to defendant five hogsheads of oil at 4*s. per gallon, the terms of the broker's note being cash on delivery. On October* 9 *the hogsheads were delivered; on October* 11 *an account was furnished, stating the amount contained in each cask according to invoice, but the defendant refused to pay until he had measured the oil; on October* 25 *the measurement took place, and on finding that the casks did not contain the amount as stated, the defendant tendered the price after allowing for the deficiency: the deficit was due to leakage, part of which took place after the delivery.* Held, *that the terms of sale being cash on delivery, the money was due immediately upon delivery of the casks and the account, and that the tender was therefore made too late; that even though a subsequent discovery of short delivery might have entitled defendant to recovery of part of the purchase price, he was estopped by his conduct in present instance; and that the tender was therefore insufficient.*

1856. Dec. 9. — Brown *vs.* Van Niekerk.

Action for the recovery of £44 2*s*., purchase price of certain oil sold by plaintiff to defendant through a broker, on September 19, 1856, and delivered on October 10, 1856.

delivery without measurement of the oil whereby to ascertain

The broker's note was as follows:—

"Sold for account of J. M. BROWN. To J. J. VAN NIEKERK.

"Three hogsheads boiled and two hogsheads raw linseed oil at 4*s.* per gallon O. M. nett. Cash on delivery. Seller to pay brokerage.

"R. TORBET, broker."

And the account annexed to the plaintiff's declaration was—

"*Cape Town.*

"MR. NIEKERK. Bought of J. M. BROWN.

"October 10, 1856. 3 hogsheads boiled oil,—

			£	*s.*	*d.*
954 containing 44½					
955 „ 43½	131½ @ 4*s.*		26	5	0
956 „ 43½					
2 hogsheads raw oil,—					
959 containing 44½					
960 „ 45	89½ @ 4*s.*		17	17	0
			44	2	0"

The defendant pleaded the general issue, and further that on Oct. 9 certain five hogsheads of oil were sent by the plaintiff to the stores of the defendant unaccompanied by any bill of parcels, which was sent only on 11th, and on presentation of which "the defendant refused payment, as there had yet been no delivery of the oil by measurement, the defendant at the same time informing the plaintiff that he would measure one of the hogsheads, and if this were proved correct he would pay the amount": that defendant measured No. 955 and found that it was deficient in the quantity of seven gallons, upon which he demanded a correct measurement of the other casks, which was refused by the plaintiff; and that thereupon on Oct. 24 he caused formal notice to be given to the plaintiff that he would proceed to the measurement on the 25th. That on the measurement which then took place it was found that there was a deficiency of ten gallons in the hogsheads of boiled oil, which entitled the defendant to a deduction of £2, and that on Oct. 30 he tendered the sum of £42 2*s.* in payment to the plaintiff. The plea concluded thus: "The defendant as matter of law submits to this Honourable Court that the said hogsheads having been purchased at a certain rate per gallon, payable cash on delivery, the plaintiff was not entitled by law to demand payment thereof before complete delivery of the said oil had been made, and there could have been no such complete

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the quantity of oil to be delivered and paid for, and that the sending of the said hogsheads to the store of defendant on Oct. 9th was only a partial delivery, to be completed by the measurement aforesaid, which the plaintiff refused to make or attend to, and before the doing of which the plaintiff was not entitled to demand payment of the oil, as to the quantity represented in the bill of parcels." The tender of £42 2*s.* was repeated.

The replication alleged that the oil had been delivered direct from the ship *Alipore*, in which it had been imported, and that the number of gallons stated in the account is the number really and *bonâ fide* bought and paid for by the plaintiff; that by the well-known custom of trade in such cases, hogsheads of oil are, in the absence of express stipulation to the contrary, taken and received as containing the number of gallons which they are invoiced to the importer as containing, and that the defendant at no time before the delivery to him made any stipulation or observation regarding the measurement of the oil, but on the contrary took complete delivery of the hogsheads, and gave unconditional receipts for the same, and promised to pay the amount claimed after he had notice of the number of gallons which the hogsheads were respectively invoiced to contain.

The facts proved in evidence were, that on 9th or 10th October five casks of oil were delivered by Roome and Sorey, boatmen and carriers, at the stores of the defendant, these casks having been landed from the *Alipore* on account of the plaintiff. The evidence with respect to the state of these hogsheads when delivered was conflicting. The boatmen who sent them stated that they were all apparently sound. The plaintiff's son stated that when he called for the purchase price on the first occasion, Oct. 11, one hogshead had been opened, and of the other four, two were sound and two seemed to be leaking very slightly, to which he called the attention of defendant's clerk, telling him "The sooner you stop this leakage the better." The evidence of the defendant's clerk was that on the arrival of the waggon he observed that three of the hogsheads were in a leaky state, and must have been so when taken from the ship, being covered with thick dried oil; and a coolie who assisted in unloading the wagon for the defendant stated that not one of the casks was full—all had been leaking—and one even to the extent of half the quantity

of oil. It was further stated on plaintiff's behalf, that on the 11th (Saturday) his son had left the account, and had returned for the money in the afternoon, not seeing the defendant on either of these occasions. On Monday, 13th, he had again gone, when the clerk took him to another store of defendant's for the purpose of receiving the money, but he did not see him. On Tuesday, 14th, he saw defendant, who said, "Oh, you have called for the account. I have not yet had time to measure the oil." Upon which he stated, "You have had it time enough to measure; we can't be answerable now." On which defendant said, "Leave it till Friday; I'll pay you on Friday." But on the witness stating that the oil had been sold, cash on delivery, and that he would not be responsible for any oil that might leak out at the defendant's place, defendant said, "I'll pay you at two o'clock—I'll send you the money by that time;" but none was sent.

Tuesday and Wednesday were allowed to remain over, and on Thursday the case was handed to Mr. Reid, attorney. The evidence of the broker was that on Saturday, 11th, he had seen the defendant, who had told him that he had received the oil and bill of parcels, and would pay the amount on the following Tuesday. On the Wednesday defendant told him that he would not receive the oil according to the invoice measure, but that the casks were first to be measured.

On behalf of defendant it was further stated, that on Monday, 13th, defendant's clerk had informed plaintiff's clerk that the oil was to be measured, it appearing leaky, and that on the Wednesday one cask (No. 955) having been emptied, he had informed plaintiff that it had contained only 36¼ gallons, instead of 43½, and that all the rest were to be measured. Proceedings were commenced on the 16th. On the 25th a measurement was made by defendant, notice of which had been given to the plaintiff, the result of which was that out of No. 954, 35¾ gallons were got instead of 44½, and out of No. 956, 37⅛ instead of 43½. Seven gallons had however been caught in vessels as leakage from these casks.

No claim was made on No. 955, which had been opened and part sold: and Nos. 959, 960 were taken as full.

The evidence of Mr. Moag, Town Assizer, was to the effect that No. 954 could not contain more than 41½ gallons, and No. 956, 41⅛. He had measured by filling the casks

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with water, and emptying them with the standard 5-gallon measure at the Municipality. The measurement by defendant had been by emptying the casks by means of a gallon measure duly assized at the Municipality. Oil-dealers who were examined stated that they invariably gauged: measurement by the means adopted not being considered so satisfactory as gauging. It was admitted between the parties that the gallon "Old Measure" in the broker's note was equivalent to the gallon in use in this Colony.

On October 30 the tender in the plea was made.

Porter, A. G., for plaintiff.

Brand, C. J., for defendant.

THE COURT held that the terms of the sale being cash on delivery, the money was due to the plaintiff immediately on the delivery having taken place, and the bill of parcels containing the quantity which the plaintiff professed to deliver, having been handed to defendant. No custom such as pleaded in the replication could take from defendant his right of ascertaining the quantity which had actually been delivered to him and paying only for such quantity. But if it were inconvenient to him to ascertain this at once, he was bound to make payment at once, and this could only be done by making payment for the quantity invoiced. From Saturday, 11th October, therefore, defendant was *in morâ*, and the plaintiff might at once have commenced proceedings. A subsequent discovery of short delivery, if arrived at with absolute certainty, might possibly have entitled the defendant to a repetition of part of the purchase price, but his contract was immediate payment: and the plaintiff was justified in taking legal steps to enforce this immediate payment. On this principle alone there was sufficient to entitle the plaintiff to a judgment: but the acknowledgment by defendant of his liability, the evidence of his acceptance by broaching and selling part of the oil, and his promise to pay, entirely estopped him from any right to insist on the number of gallons, which might afterwards appear on actual measurement, where there was full *bona fides* on the part of the plaintiff. After this, and the leakage which had been

allowed to go on, while the oil was in defendant's possession, no measurement could be received as against the plaintiff. The tender of October 30 was neither sufficient in amount nor made in sufficient time.

1856. Dec. 9. Brown vs. Van Niekerk.

Judgment for plaintiff with costs.

[Plaintiff's Attorneys, J. & H. Reid. Defendant's Attorney, G. J. De Kortè.]

Trustees of Long, Ebden & Co. *vs.* Holmes.

Partnership.—Non-liability of new partner for debts of old firm.—Set-off.

L. & Co. entered into an agreement with defendant in October, 1853, *to purchase a ship on joint account: in December they retired from the agreement after defendant had incurred certain expenses for a portion of which L. & Co were liable: in January,* 1854, *E. was admitted as a partner, notice being given that the business "will henceforth be carried on as L. E. & Co.": debts due to L. & Co. to be paid to L. E. & Co.": and the stock of the old firm was taken over by the new. Subsequently defendant incurred liabilities to L. E. & Co.: upon their surrender, their trustees sued him for payment.* Held, *that he could not set off the expenses due under the agreement of* 1853, *as there was no proof of consent on the part of E. to take over this liability.*

Plaintiffs claimed from defendant the sum of £228 1*s.* 11*d.*, being the amount due to the insolvent estate of Long, Ebden & Co. by defendant for purchases made in April, 1855.

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Defendant in his plea admitted the amount claimed to be due, but pleaded that in October, 1853, the mercantile firm then existing under the style of J. F. Long & Co. entered into an agreement with him to purchase, on joint account, a vessel to be built and ordered from America: that he advanced the necessary funds for this purpose, ordered the vessel and incurred expenses; that "while the defendant was so doing and proceeding with the carrying out of the said agreement, one G. N. Ebden was, on January 1, 1854, admitted a partner

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in the said firm, and the name and style of the said firm of J. F. Long & Co. was altered into that of Long, Ebden & Co., into which merged and by which were taken over all the debts and liabilities of the said firm of J. F. Long & Co., and amongst them the liabilities in respect of the agreement aforesaid."

Further, that in the middle of December, 1853, J. F. Long & Co. countermanded the order and withdrew from the agreement, but at that time expenses, etc. to the amount of £180 9*s.* 1*d.* were already incurred, for which sum the firm of J. F. Long & Co. became liable, "and afterwards the said firm of Long, Ebden & Co. in virtue of the premises became so liable." That defendant was entitled to deduct from the amount of £228 1*s.* 11*d.* this sum of £180 9*s.* 1*d.*, and that he was entitled to the costs of these proceedings, having tendered before action brought, the balance of £42 4*s.* 7*d.*, and subsequently, in August last, £50 with costs to that date.

The facts in evidence were that in 1853, and for some years previous, J. F. Long and C. C. Long had carried on business as merchants in Cape Town, under the style of J. F. Long & Co. In October, 1853, the agreement with defendant that he should order a ship on joint account was made as stated in the plea, and in December, 1853, the order was countermanded by J. F. Long & Co. and this countermand acquiesced in by defendant, who stated at the time that certain expenses had been incurred.

On December 31, 1853, articles of co-partnership were entered into between the two Longs and G. N. Ebden, and on January 5, 1854, the following notice appeared in the *Gazette*:—

"NOTICE OF CO-PARTNERSHIP.

"Mr. G. N. Ebden having been this day admitted a partner in our firm, the business heretofore conducted by the undersigned will in future be carried on under the style or firm of Long, Ebden & Co.

"J. F. LONG & Co.

"*St. George's Street, Cape Town.*
"January 2, 1854.

"All debts due to the late firm of J. F. Long & Co. are requested to be paid to Messrs. Long, Ebden & Co. at their counting-house, St. George's Street. "J. F. LONG & Co."

On January 2, 1854, Long, Ebden & Co. took over the stock, &c. of J. F. Long & Co., and from that date paid

all the liabilities of J. F. Long & Co. as they became due, a distinct account being kept in the books of Long, Ebden & Co. of their payments and receipts on behalf of J. F. Long & Co. It was admitted that if there had been no doubt about the correctness of defendant's account, Long, Ebden & Co. would have paid it when first presented by defendant early in 1855. On the presentation of defendant's account, C. Long, one of the partners, in the opinion that Home, Eagar & Co. had shared in the order, and were liable for part of the expenses, had made out an account for this share of expense as due from Home, Eagar & Co. to Long, Ebden & Co., all accounts having been so made out after January, 1854. Mr. Ebden, the incoming partner, was not aware of the transaction on which this claim was founded until March or April, 1855, when, after a purchase of goods by defendant, for which the usual promissory note was requested, he stated that he had a counter-claim. At this time Mr. Ebden stated that, although he did not admit the claim as being against Long, Ebden & Co., he would have no objection to admit it in deduction of the goods if certain objections which had been raised by Mr. C. Long against some of the items were allowed by defendant. This was declined. Long, Ebden & Co. surrendered their estate on May 31, 1855.

It was agreed at the bar that the ascertainment of the exact amount of the defendant's claim should await the decision of the Court on the question whether he was entitled to make any claim against Long, Ebden & Co.

Porter, A. G., for plaintiffs, maintained that no action could at any time have been brought against the firm of Long, Ebden & Co. for the claim of defendant against J. F. Long & Co., and this being the case, he could not claim compensation now as against a debt due by him to Long, Ebden & Co. An incoming partner and the partnership into which he has come are not liable for the previous obligations of the old firm, unless the new firm distinctly takes over such liability. (*Story on Partnership*, § 152; *Collyer on Partnership*, 2nd ed., p. 524; *Shireff* vs. *Wilks*, 1 East, p. 48; *Voet*, 16, 2, 10; *Van Leeuwen Cens. For.* 4, 36, 24; *Bell's Commentaries*, 4th ed., vol. ii., § 664; *Ex parte Peele*, 6 Ves., p. 602.)

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Brand, C. J., for defendant, admitted the law as quoted, but contended that the particular circumstances of this new partnership created an implied obligation and duty on the part of Long, Ebden & Co. to pay the debts of the old firm. All the assets having in fact been taken into the new firm, the new firm thereby pledged themselves to pay the debts of the old.

THE COURT held that there was nothing in the circumstances of this case which withdrew it from the operation of the general rule, that an incoming partner is not liable for debts contracted by the firm previously to his joining it. Not only was there not the concurrence of all the members of the new firm in taking over this liability of the old, but it had been expressly repudiated by Mr. Ebden, whose consent was necessary before he or the firm of which he was a member could be held liable for the claim.

Judgment for plaintiffs for £228 1*s.* 4*d.*, with costs.

[Plaintiffs' Attorneys, FAIRBRIDGE, HULL & MEINTJES.
Defendant's Attorney, A. HUTCHINSON.]

In re MARCUS.

Insolvency—Ord. 6, 1843, § 117.—*Certificate.—Practice.*

The application for the granting of an insolvent's certificate under § 117 *was opposed by a creditor on the ground that the requisite number and value had been obtained by the purchase of one of the debts by an agent of the insolvent; subsequently the opposition was withdrawn, but the Court postponed the granting of the certificate, pending examination of the insolvent by the Court in Chambers, as to the alleged transaction.*

1856. Dec. 4. „ 16.

In re Marcus.

Application by Marcus, an insolvent, for the allowance of his certificate, he having obtained a certificate consenting to his discharge signed by four-fifths in number and value of the creditors who had proved against his estate.

The application was opposed by one Bam, a creditor who

had not signed, on the ground that the requisite number and value had been obtained by means of the payment of £100 to P. J. Haupt & Co., creditors of the insolvent for £341 11*s.* 6*d.* by one Lee, who thereupon was authorized to sign for the rehabilitation of the insolvent, and who was alleged to be merely the agent of the insolvent in the transaction. On behalf of the insolvent, the affidavit of Lee was produced, to the effect that he had purchased the claim of Haupt & Co. *bonâ fide* on his own account, "having been acquainted with the insolvent upwards of two years past, during which time deponent was in the habit of receiving from him much kindness and attention in the way of business—in consequence whereof, and of the intimate friendship existing between him and the insolvent, he applied to Haupt & Co., and made the purchase;" and further, that "the said sum of £100 was *bonâ fide* the money of deponent, and in no way the property of the insolvent." There was also an affidavit from D. Haupt, to the effect that he had never stated, as asserted in the affidavit of one Scheuble, that Lee had purchased the claim of Haupt & Co. as agent for the insolvent.

Brand, C. J., for the applicant.
Porter, A. G., for Bam.

The Court directed that the parties who had made the affidavits should on a future day be examined *vivâ voce* with respect to their allegations, so that proper inquiry might be made into their truth or falsehood.

Posteà,—

Cole, for the insolvent, moved for the allowance of the certificate.

Porter, A. G., stated that he was instructed to say that the opposition had been withdrawn.

The Court, after consideration, stated that although the opposition had been withdrawn, the allegations in the affidavits filed were of such a nature as to require the Court to enter into an examination of their truth or falsehood before the certificate could be granted. If the statements in

[illegible] the affidavits on the part of the opposing creditor were [illegible] case it was in the power of justice to the insolvent that he should have an opportunity of proving their falsehood. If on the other hand the allegations were found not to be true it was the power of the opposing creditor in order [illegible] to oppose the application, to obtain a further remand for such examination, as he should think fit. The insolvent now being on the suggestion of the Commissioner now before the Court should be examined before the Court with reference to the present transaction, and if the Court should then think it necessary, the other parties whose affidavits had been filed. The insolvent might make application for such examination at the usual sittings in Chambers—the certificate to be suspended until the further order of the Court after he shall have been so examined.

APPENDIX.

MELLER *vs.* BUCHANAN. (Reported 1 Searle, p. 260.)

Judgment.

Meller *vs.* Buchanan.

The following judgment was delivered by BELL, J.:—

[The learned Judge commenced by commenting upon the conduct of the learned Recorder in allowing the application of Byrne, out of which the alleged slander arose, to be put before the Court at all. Byrne had applied to the Court for leave to conduct his own cases in person, on the ground that all the advocates were incompetent. Upon the close of his application, the different advocates referred to, of whom defendant was one, rose to refute the charges made against them, and in the course of his reply, defendant made use of the expressions complained of by plaintiff.]

Mr. Buchanan was preceded by Mr. Walker and conceiving himself apparently, as he was to some extent, justified in conceiving that he had, if not the authority and approbation of the Court, at least, the permission and sanction for following the course Mr. Walker had adopted, he set out with some indecorous observations on the veracity of Byrne . . . . he then went through the merits of the Natal Bar, commencing with Mr. Meller, in the words forming the subject of the action.

Before I notice these words, it is but justice to defendant to observe that when Byrne in the course of his address had gone through the members of the profession *seriatim*, giving his reasons as to each, why he could not employ his services, the defendant interrupted him to notice that he had omitted the name of the plaintiff, and when answered that his holding a situation under Government made that unnecessary, he replied that that was not so. This passage looks as if, at that moment at least, the defendant meant

to convey to his hearers that if Byrne could not get a gentleman sufficiently skilled in those he had mentioned, still his application was not justified, as there remained Mr. Meller against whom he had not suggested any objection. These observations bring me to the words complained of by the action. It is obvious that Mr. Meller's name was introduced for the purpose of showing that Byrne had omitted it in enumerating the gentleman practising before the Court, and of drawing attention to the fact that Mr. Meller was not one of those who had attached his name to the memorial so offensive to Mr. Byrne; and they anticipate any objection which might have been suggested from the circumstance of Meller having received an appointment as Magistrate, by saying that the Governor would not in the circumstances refuse to allow him to appear in Court. Up to this point, the words are, if anything, rather complimentary to Mr. Meller. But the language then assumes an ambiguous character. Mr. Meller is spoken of as a "greater light" before whom the "lesser lights" were to sink into obscurity. This seems to refer to something which had been said before, possibly by Meller himself, possibly by some one else. And it seems to have been so rankling in Buchanan's breast, as to have brought from him the offensive observation that, although he would be willing to sink before the brilliancy of the greater lights when they should appear, yet "he would not say he would do so before a barrister, who after agreeing for a retainer of eighty guineas, had, on the nod of the Governor, betrayed his client for a paltry appointment of £300 a year." Now these are the words upon which the action is grounded, and had they stood by themselves, without either what preceded them or what followed them, I am not prepared to say that they would not be actionable without proof of actual malice. The higher the office of an advocate stands, both for integrity, honour and all those qualities which justify the most unlimited confidence, the stronger should be the guards with which the law fences it from attack, and certainly there could be no greater accusation against an advocate than that he had "betrayed his client," if by these expressions it were meant to convey to the hearer or reader that the advocate had played into the hands of the client's opponent, either by betraying the secrets

of his client, or while pleading his cause, or omitting to bring forward those points which would ensure his success. I think, however, it is impossible that either the hearers or readers of the words complained of could ascribe either of these meanings to them; neither can the meaning be ascribed to them, that the advocate, after having received payment of his fee ,betrayed his client by withdrawing from the case, without returning his fee. For the words are "after agreeing for a retainer," not after receiving it. The words seem therefore to convey no other meaning than what was the fact, that Mr. Meller, after agreeing for a fee which is called a retainer, received an appointment from the Governor, and on that account, neither took the fee, nor argued the case of his client, and this in the vulgar petty spite which seems to have moved Mr. Buchanan at the time, by recollection of the distinction which some one had made between the greater and lesser lights, he is pleased to call betraying his client. But these words could not mislead either the readers or the hearers of the passage in which they occur, from seeing that all that was in fact alleged against Meller was the circumstance of his having taken a Government appointment, which had been given him by the Governor, in order to disqualify him, as was supposed, from arguing a case which he had agreed to argue; for this intention on the part of the Governor, I suppose, was meant to be insinuated by the words "on the nod of the Governor." Now an accusation of this conduct by an advocate would be far from actionable, and I do not conceive it is made more actionable by the use of the over-strained and inapplicable epithet of "betrayed" to his conduct. The excess was transparently referable to the soreness which the recollection of his being a lesser light had produced in Buchanan. I do not therefore think that the words "betrayed his client," used as they were, are actionable. Even if I were mistaken in this, it would still remain for me, sitting as a juryman to assess the damage, as well as a Judge to determine the relevancy, to consider the *animus* with which the offensive expressions were used. In doing this, I must keep in view the occasion on which the words were used and their context. Now the occasion was one on which it may very well be supposed that the feelings of Buchanan were much excited by the expressions which had been used by Byrne, and the conduct of the Judge in allowing these

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expressions to pass unrebuked, the whole having reference to the very matter out of which, the offensive expressions arose, and with regard to the context, Meller's name certainly was introduced at first with perfect pertinence to the matters in discussion. Byrne had shown that there was nobody he could employ as an advocate, proving this by going through the members of the profession and descanting upon their qualifications. Buchanan introduces Meller's name in order to say that it is not so, for there is still Mr. Meller who has not the disqualifications you mention; and as to his having a Government appointment, that could be got the better of. This is what immediately precedes the words complained of, and what immediately follows them proves more distinctly still, the motive with which Meller's name had been introduced. The Judge intimates that the Government appointment presented no obstacle to Mr. Meller's appearing in Court, whereupon Buchanan resumed in the words—"This was a material point to be considered, inasmuch as there was a man whom Mr. Byrne might have engaged, and who is *clothed with all the qualifications of the absence of which he* (*Byrne*) *had so bitterly complained.*" Now when I look back to see what these qualifications were, and consider the import of this passage which follows, and of that which precedes the words complained of, I cannot resist the conviction that Meller's name, and what was said of him, was used in the fair and honest prosecution of what Buchanan conceived to be his right and interest, and that he did not use the occasion as a cover of venting his malice against that gentleman, which alone would justify me in subjecting him to damages. I think the expressions complained of are in themselves not actionable for the reasons I have before given, and even if actionable are not to be attributed to malice, or any aforethought intention to injure, but to a sudden ebullition of pitiful spite and envy, provoked while answering Byrne's contumelious observations upon himself and his brethren, by the accidental recollection of the disparaging comparison drawn of himself as a lesser light, and Meller and others, the greater lights. I think Mr. Meller has been more sensitive than the circumstances justified. As there had been nothing done by him, so there was nothing said of him, which in my opinion could injure his character and respectability. On the other hand I by

no means wish it to be understood, that I in the slightest degree justify or approve of the expressions which were used by Mr. Buchanan; they were paltry and contemptible, unworthy of the position which he he had been allowed to assume, and disrespectful to the Court, but unfortunately his conduct was not worse than that of every one who had any part in these proceedings, so that there was no one to control or reprove him. My judgment therefore is, that the decree be for the defendant, each party paying his own costs. This will probably in future repress such indecent proceedings, and such over-sensitive prosecutions, and while it gives neither party more nor less than he ought to have, if not likely to restore peace, at least prevent further jarring. The Chief Justice calls my attention to two questions:—

1st. The competency of the order of the Court for further hearing and determining.

2nd. The competency of the Court below to entertain the application for recall of its own order.

With regard to the first, the clause in the Ordinance constituting the District Court of Natal is in the exact terms of the clause in the Charter under which similar orders by the Circuit Courts of the Colony are made.

[The learned Judge then discussed the point at some length, stating his opinion that a Circuit Court Judge could remove a case to the Supreme Court for argument, even against the wish of the parties; but that the power thus given was never intended to be applied to a case such as the present, as the Judge was not justified in *declining* himself; but should simply have rested the objection upon the record.]

With regard to the second question, I have very little doubt upon it. I do not see that there is anything in an order of removal which, so long as the record is within the control of the Court, should prevent the Court from re-hearing it; this in effect was all that was done by entertaining the motion. [The learned Judge then concluded by commenting upon the conduct of the Recorder in allowing the motion for recall of the order to be discussed before him at all, instead of expunging the affidavit, with public censure.]

MUSGRAVE, J., concurred on all points.

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WYLDE, C. J., dissented in regard to to the powers of the Judge to remove the case or to re-hear the order of removal after he had made it, considered that that order withdrew the cause from all control of the Judge over it, and placed it within the jurisdiction of this Court. Further, that the words uttered by defendant were actionable under the terms of the Dutch law, which were more large than the precedents in the law of England would sanction; the words being actionable, Meller was justified in the circumstances and called upon to bring the action.*

* For discussion of removal of a case from one Court to another, see *Johnston* vs. *Byrne*, 1 Searle, p. 157.

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to defendant on joint account with themselves: defendant knew that the coals were a consignment to L. & Co. as agents. Defendant gave bills for the price of the coals, and these were renewed from time to time: the greater portion of the coals was delivered to L. & Co., the remainder to defendant. L. & Co. sold certain of the coals, crediting these sales to the joint account of themselves and defendant. Subsequently defendant and L. & Co. agreed to cancel the above purchase on joint account, L. & Co. to provide for the bills; thereafter L. & Co. sold some of the coals and credited the plaintiffs with the proceeds. L. & Co. did not provide for the bills, and two or three months after the cancellation, surrendered. Shortly before the surrender defendant claimed the coals in L. & Co.'s possession, and took symbolical delivery. *Held*, that the sale by L. & Co. to defendant was void and fraudulent in law; and that plaintiffs were entitled to delivery of the coals, or to judgment for their value, less the price of such as had been sold by L. & Co. on plaintiffs' account subsequent to the cancellation. *Forbes, Still & Co.* vs. *Sutherland* 231

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A vessel in harbour was attached *ad fundandam jurisdictionem*, at suit of C., a creditor of the owner: while under attachment, the plaintiffs, at the Captain's request, supplied the crew with provisions. The ship was sold in execution of the judgment in the above suit: the plaintiffs claimed to be paid out of the proceeds, in preference to C. *Held*, that their claim was not preferent. *Reid* vs. *Crozier & Cloete* 183

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Held (*per* MUSGRAVE and BELL, JJ.), that the occasion was privileged by virtue of Ord. 7, 1843, § 9, and that proof of express malice, the onus of which was on plaintiff, had not been made, and that the meeting at which the report was made must be regarded as a meeting of Consistory.

(*Per* WYLDE, C. J.) that the facts above specified were sufficient evidence from which to infer malice on defendant's part and rebut the case of privilege, and that the meeting was not proved to have been a meeting of Consistory.

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LETTERS of Administration.—See Will. 3

LIBEL.—*Innuendo—Rules of Horse-Racing—Stewards and Judges.* —Plaintiff was one of three stewards at certain horse-races, and as such had to decide, in conjunction with the others, on the results of the races in cases of dispute. He had an interest in one of the races in which a horse of defendant's ran; a dispute as to the result of the race arose: according to the Turf Rules, no steward shall take part in the decision of a race in which he has a pecuniary interest: the plaintiff consequently withdrew from the decision, which was given against defendant by one steward and two judges appointed in place of the other two stewards in conformity with the rules. All this was well known to defendant. Subsequently plaintiff stated in an advertisement that defendant's horse "was distanced by three gentlemen stewards who had not the slightest interest in the race." Defendant published a letter commenting upon this advertisement, in which he stated: "It seems rather strange that the three gentlemen stewards were disinterested parties when a certain gentleman steward won a good round sum" by defendant's horse being distanced. Plaintiff brought an action for libel, alleging that defendant's innuendo was that plaintiff had assisted in deciding in his own favour a race in which he had a pecuniary interest:—*Held*, that the innuendo would not bear this construction, and that defendant was therefore entitled to judgment. (EBDEN, J., *diss.*) *Bayley* vs. *Chandler* 177

MAGISTRATE'S Jurisdiction.—See Dutch Reformed Church.

MAIN ROADS.—*Ord.* 8, 1843, §§ 3, 4, 26—*Ord.* 12, 1844—*Road Rates —Proclamation by Governor.*—The defendant was summoned by the Central Road Board for payment of road-rates under Ords. 8, 1843, and 12, 1844. He pleaded that the provisions of Ord. 8, 1843, had not been complied with, inasmuch as the Board had not recommended to the Governor any roads to be by him proclaimed as main roads, as required by § 4, and that the Board could only expend rates upon such duly-proclaimed main roads; and that the rates collected by plaintiffs had not been expended upon the roads in the division wherein the rates were levied, as required by § 26: these defences were sustained. *Central Road Board* vs. *Meintjes* 165

MALICE in action of Slander.—See Dutch Reformed Church.

1. MALICIOUS DESERTION.—*Onus of Proof—Le Roes* vs. *Le Roes* .. 13

2. —— *Restitution of Conjugal Rights—Period of Absence—What evidence is sufficient to prove malicious desertion.*—Time of absence before commencement of proceedings is not a necessary ingredient in an action for restitution of conjugal rights where the desertion is clearly wilful. (*Per* WYLDE, C. J., and EBDEN, J.)

Decree for restitution of conjugal rights granted where wife

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had been absent for six days before issue of summons. (BELL, J., *diss.*) *Mostert* vs. *Mostert* 128

1. MANDATE.—*Liability of Mandatory—Negligence—Registered Letter.*—The defendant, a cattle-dealer, agreed, for no consideration, to collect a sum of money for plaintiff, who resided at a distance: after collection, he enclosed the amount in notes in a letter to his brother who lived in the same town as the plaintiff, transmitting in the letter £30 of his own. The letter was registered, but was lost in the post: no evidence was given of its contents, but it was proved that defendant was in the habit of transmitting sums of money to his brother to pay his own debts:—*Held*, that defendant was liable to make good the loss to the plaintiff. *Knoble* vs. *Murray* 75

2. —— Law of, discussed.—*In re Montefiore* 201

MARRIAGE Order in Council, § 6.—*Proof of Marriage.*—A marriage performed by a minister who stated that he belonged to the Dutch Reformed Church, but that he was ordained to the ministry of the Christian religion as a missionary of the London Mission Society, held to be valid as satisfying § 6 of the Marriage Order in Council (BELL, J., *dubit.*). *Kicherer* vs. *Kicherer* 81

1. MORTGAGE, Special and General.—See Writ of Execution.

2. —— Agreement of, by Insolvent.—See Insolvency. 8

MUNICIPALITY, Liability of, for damages for negligence. *Port Elizabeth Municipality* vs. *Nightingale* 214

1. NEGLIGENCE, Liability of Mandatory for.—See Mandate. 1

2. ——Liability of Municipality for.—See Damages. 2

3. ——Liability of Sheriff for.—See Sheriff.

NOTICE OF DISHONOUR.—See Provisional Sentence. 13

OBLIGATION AD FACTUM PRAESTANDUM.—See Provisional Sentence. 14

1. ONUS of Proof.—See Malicious Desertion. 1

2. —— of Malice in action of Slander.—See Dutch Reformed Church.

3. —— as to knowledge of Slander within a year.—See Slander. 2

ORDINANCE, Effect of non-confirmation of, within three years after promulgation. *Fielden* vs. *Anstie and Buchanan* 15

ORD. 33, 1827, § 3.—See Dutch Reformed Church.

—— 9, 1836.—See Municipality.

—— 6, 1843.—See Insolvency.

—— 7, 1843, § 9.—See Dutch Reformed Church.

—— 8, 1843, §§ 3, 4, 26.—See Main Roads.

—— 6, 1844, § 2.—See Auctioneer.

—— 12, 1844.—See Main Roads.

—— 14, 1845.—See Jurisdiction. 3

—— 15, 1845, § 3.—See Will. 2

—— 32, 1846.—See Jurisdiction. 3

—— 2, 1853, §§ 2, 3.—See Customs Duty.

PARTITION OF IMMOVABLE PROPERTY.—*Sale.*—As to whether one of two parties equally interested under a will, in certain immovable

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property can compel a partition, the other being anxious for a sale with bonus (not decided). *Hoets* vs. *De Smidt* 3

PARTNERSHIP 1.—*Effect of dissolution, where there are three separate firms—Rights of Receiver—Blackburn* vs. *Krohn* .. 209

2. —— *Non-liability of new partner for debts of old firm—Set-off.*—L. & Co. entered into an agreement with defendant in October, 1853, to purchase a ship on joint account: in December they retired from the agreement after defendant had incurred certain expenses for part of which L. & Co. were liable: in January, 1854, E. was admitted as a partner, notice was given that "the business will henceforth be carried on as L. E. & Co., debts due to L. & Co. to be paid to L. E. & Co."; and the stock of the old firm was taken over by the new. Subsequently defendant incurred liabilities to L. E. & Co.; upon their surrender, their trustees sued him for payment:—*Held*, that he could not set off the expenses due under the agreement of 1853, as there was no proof of consent on the part of E. to take over this liability. *Long, Ebden & Co.'s Trustees* vs. *Holmes* 307

PARTY-WALL.—*Encroachment—Rights and duties of owners of a party-wall discussed.*—Defendant built upon the whole of a party-wall owned by him and plaintiff, and projected a roof over portion of plaintiff's property without his consent. He was ordered to remove the encroachment, as being only entitled to cover one-half of the breadth of the wall. *Pike* vs. *Hamilton, Ross & Co.*.. 191

1. PLEADING.—*Account annexed to plea.*—Defendant was sued for the price of a ship built for him by plaintiff: he pleaded that the ship was injured whilst being launched, and that he was entitled to set off the amount of the damage, and annexed to the plea an account showing the amount of deductions: no injury to the ship was proved, but it was proved that defendant had supplied to plaintiffs an anchor and cable in order to complete the launch, for which a charge was made in the account annexed to the plea:—*Held* (EBDEN, J., *diss.*), that as the plea only alleged injury to the ship, the Court could not take notice of this item in the account. *Murray* vs. *Roome and Sorey* .. 157

2. —— See Slander. 2

PRACTICE.—See Insolvency. 4, 8

PREFERENCE for provisions supplied to Ship.—See Ship. 3

PRESCRIPTION.—See Right of Way. 2. Slander. 2

PRESENTMENT.—See Provisional Sentence. 8, 13

PRINCIPAL and Agent.—See Agent.

PRIVILEGE.—See Dutch Reformed Church.

PRIVY COUNCIL.—See Appeal.

PROCLAMATION by Governor.—See Main Roads.

PROMISSORY NOTE.—See Cession. 1 .

PROOF OF DEBT.—See Judgment.

1. PROVISIONAL SENTENCE.—*Summons.*—Provisional sentence *granted* on an undertaking to pay a sum by instalments, the condition

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being that the whole should be due in case of failure to pay one or two instalments; the summons alleging failure to pay two successive instalments, but not averring the particular instalments wherein default had been made. (BELL, J., *diss.*) *Muller* vs. *Whitehouse* 38

2. PROVISIONAL SENTENCE.—*Promissory Note without date as to year.* —Provisional sentence granted on a promissory note, payable one month after date and dated "Dec. 22nd," with no date as to year: there being evidence that the note was presented to defendant on October 8 "last," and that he then promised to pay it. (BELL, J., *diss.*). *Robbertse* vs. *Harbin* 39

3. —— *refused* where the Sheriff's return stated that the summons had been served on defendant's agent qualified by written authority (not produced), and that the agent had accepted the service. *Hofmeyr* vs. *Jargens* 73

4. —— *refused* where Sheriff's return stated that summons had been served upon defendant's agent, who was empowered to receive service for him in his absence; but the return-day was extended. *Harper* vs. *Southey* 74

5. —— *Release of Surety—Subsequent parol agreement.*—Defendants bound themselves as sureties and co-principal debtors, renouncing all benefits, upon a document in the form of a promissory note, payable one year after date. Evidence was given that the transaction was regarded at all events by the maker and the payee, the plaintiff, as being in reality a loan, the principal to become due on failure of payment of interest. Interest was paid from time to time for several years by the maker, who subsequently surrendered:—*Held*, that the sureties were not released, and provisional sentence must be *granted* against them. *Victor* vs. *Haupt* 99

6. —— *granted* against the drawer of a bill of exchange when the acceptor and endorser had not been summoned, and there were actions pending between them and the drawer in respect of this bill and others, and it was alleged but denied that plaintiff was only a nominal holder. *Van Reenen* vs. *Stanford* 111

7. —— *refused* against an endorser when the note had been presented to the maker the day after it fell due.—Magistrate's Court costs only allowed where provisional sentence was granted against the maker of a note for a sum within the Magistrate's jurisdiction, the endorser having been held to have been discharged. *Meeser* vs. *Combrink* 110

8. —— *granted* on a promissory note, payable at sight, subject to proof of presentment being given to the Registrar. *Ziervogel* vs. *Bekker* 139

9. —— Defendant, married in community to K., was sued on a promissory note given by K. before her marriage with defendant for goods bought by her (K.) at a public sale of the joint estate of K. and her first husband. Plaintiff and K. were executors of the joint estate, and plaintiff was administering executor. Subsequently to the purchase by K. the joint estate

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was surrendered as insolvent. K. had obtained her certificate of discharge under Ord. 6, 1843, § 117. THE COURT *granted* provisional sentence. [EBDEN, J., *diss:*] *Schikkerling* vs. *De Beer* 154

10. PROVISIONAL SENTENCE *granted* on an acknowledgment of debt signed by one J. "for A.," the defendant; the summons calling on defendant to deny J.'s signature or his authority to sign having been personally served on defendant, who did not appear. *Verwey* vs. *Abo* 190

11. —— *granted* on a note made payable "at Somerset" without proof of presentment. *Verwey* vs. *O'Reilly* 190

12. —— *Exception of non-qualification.*—Defendant was summoned on a provisional clause in a bond passed by him in favour of plaintiff as executrix testamentary in her first husband's estate. The bond bore a cession to plaintiff by B. as executor testamentary in the estate of plaintiff's second husband, to whom she was married in community of property. The cession was made in part payment of plaintiff's share of the joint estate. The summons was by the plaintiff individually. THE COURT *refused* provisional sentence on the ground that plaintiff could only sue as executrix of her first husband's estate, but granted leave to amend the summons on payment of costs of opposition. *Meintjes* vs. *Van Rooyen* 206

13. —— Where a note was made payable at a particular place, and defendant opposed on the ground that the summons did not aver presentment at that place, the Court *refused* provisional sentence, but gave the plaintiff leave to amend on payment of costs of the day.

Where a note was made by H. in favour of D., and by him endorsed, and, long after the due date, personal notice of dishonour was given to D., who then wrote across the note "accepted notice," provisional sentence was *refused* against D. *Verwey* vs. *Hunnay Brothers and Dell* 270

14. —— *granted* on certain liquid documents where defendant opposed on the ground that there were accounts still open between the parties, and on these there was a balance due to him from the plaintiff.

Provisional sentence cannot be granted on an obligation "ad factum praestandum." *Christie* vs. *Kinnear* 272

15. —— *granted* for an instalment of the purchase price of land sold by written contract five years before, though transfer had not yet been effected; in the absence of evidence that the delay was attributable to plaintiff. *Haarhoff* vs. *Wippner* 299

QUORUM OF JUDGES.—See Jurisdiction. 4

RECEIVER under a Partnership, Rights of. *Blackburn* vs. *Krohn* .. 209

REGISTERED LETTER, Loss of.—See Mandate. 1

1. REGISTRATION of Owner of Ship.—See Ship. 1

2. —— of Antenuptial Contract.—See Antenuptial Contract.

RESOLUTION of Creditor.—See Insolvency. 3, 5

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RESTITUTION of Conjugal Rights.—See Malicious Desertion.

1. RIGHT OF WAY.—*Meaning of "Heirs and Successors" in a Grant.*—A., the owner of estate "X," by notarial agreement gave to B., the owner of adjoining estate "Y," and to "the future proprietors and occupiers" of "Y," a right of road across "X," reserving to himself, "his heirs and successors" the right to use the road "with horses and carriages" over part of "Y." The agreement was annexed to the titles of both estates. The plaintiff purchased one of the lots of estate "X," which had been divided and sold on the insolvency of A.'s successor. Defendant was the proprietor of that part of "Y" over which the reserved road ran, and claimed a right to obstruct the road. Neither plaintiff nor defendant owned the original homesteads of "X" and "Y":—*Held*, that plaintiff was entitled to the use of the road. *Ebden* vs. *Anderson* 64

2. —— *Trespass—Prescription—Continuous User.*—Plaintiff, owner of estate "W," sued defendant, owner of estate "K," for trespass. Defendant pleaded that there was a right of way which had been in use for forty years from "K" across "W" to estate "Z." It appeared that there had been an old road as alleged, but evidence was given that the proprietor of "W" had closed it up fifteen years before, on purchasing from the then proprietor of "K" certain portion of estate "K," and there was no mention of any reserved right of road in the transfer of this property. The closing up of the road was specifically denied by defendant's witnesses. There was no trace of a road remaining across estate "Z"; but it was proved that at various times the road had been used as alleged by defendant:—*Held*, that plaintiff was entitled to judgment. *Dobie* vs. *Schikkerling* 94

ROAD RATES.—See Main Roads.

RULE OF COURT 8.—See Arrest.

—— 36.—See Writ of Execution.

—— 37, 38.—See Appeal.

1. SALE of Immovable Property.—See Partition.

2. —— by Auction.—*Conditions of Sale—Tender.*—Where defendant bought goods of plaintiffs, who were auctioneers, and the conditions of sale stated that goods should be removed within three days of sale by buyer on deposit by him of 10 per cent. of their value, and also that they should be paid for by cash or bill to be approved of by plaintiffs: and it was further proved that defendant had previously bought goods under like conditions at plaintiffs' sale, for which payment had been made by promissory notes; and that he had been allowed to remove the goods in question without deposit:—*Held*, that plaintiffs were entitled to ask for a payment in cash or by approved bill, as each sale was a separate transaction, and that defendant's tender of a promissory note was bad. *Blore and Bartman* vs. *Oppenheim* 112

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3 .SALE by Auction.—*Bonus.*—M. made a bid on his own behalf at a public sale held by plaintiff, an auctioneer, and took £5 bonus: the conditions of sale stated that the highest bidder should be considered purchaser: before the property was knocked down, M. agreed with defendant that the latter should take over the bid: M. gave defendant £4 of the bonus and kept £1: the property was knocked down to M., and the auctioneer, on instructions given by M., took down the purchase as made by Mq.q.: in an action to compel defendant to sign the conditions of sale, the Court gave judgment for plaintiff. *Steytler* vs. *Freeman* 136

4. —— Purchase by agent on joint account of himself and another, of goods entrusted to him to sell, declared void. *Forbes, Still & Co.* vs. *Sutherland* 231

5 —— Completion of.—See Insolvency. 7

6. —— and Acceptance.—Plaintiffs, merchants at Graafreinet, by their agent G., bought gunpowder in kegs from defendants: the sale took place on January 3rd at Port Elizabeth: no sample was given and no inspection made, but the defendants represented the powder to be good: on 17th delivery was made to G., who sent the powder to plaintiffs: the latter received it on 31st, and gave a promissory note at six months for the price, which was paid when due. On February 20th, plaintiffs sent some of the powder to Richmond, and on being opened it was found to be damaged from wet, and worthless: plaintiffs gave notice of this to defendants; subsequently the rest of the powder was found to be damaged: the carrier's evidence was that the powder was in each case delivered in the same condition as received: plaintiffs claimed return of the purchase price:—*Held*, that the powder was accepted at Port Elizabeth; that the plaintiffs had allowed a reasonable time for the examination thereof to elapse, and could not succeed. *Meintjes & Dixon* vs. *Deare & Dietz* 294

7. —— *Acceptance—Measurement—Tender.*—Plaintiff sold defendant five hogsheads of oil at 4*s.* per gal.: the terms of the broker's note being cash on delivery. On October 9th the hogsheads were delivered; on 11th an account was furnished, stating the amount contained in each cask according to invoice, but the defendant refused to pay until he had measured the oil: on 25th the measurement took place, and on finding that the casks did not contain the amount as stated, defendant tendered the price after allowing for the deficiency: the deficit was due to leakage, part of which took place after the delivery. *Held*, that the terms of the sale being cash on delivery, the money was due immediately upon delivery of the casks, and the account, and that the tender was therefore made too late; that even though a subsequent discovery of short delivery might have entitled defendant to recovery of part of the purchase-price, he was estopped by his conduct in the present instance, and that the tender was therefore insufficient. *Brown* vs. *Van Niekerk*. 302

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SCHEDULES.—Costs of preparation of for voluntary surrender, come out of the estate. *Staines* vs. *Watts' Trustee* 245

SERVICE of Summons on Agent.—See Provisional Sentence. 3, 4

—— of Copy of Note.—The copy of a promissory note served on defendant did not contain certain figures and reckoning on the back of the original: the affidavit of plaintiff's attorney stated that these had been made by plaintiff at defendant's request, after issue of summons. THE COURT granted Provisional Sentence. *Schikkerling* vs. *De Beer* 154

SERVITUS Luminum.—Right of obstruction of neighbour's lights, and duty of giving notice of objection to obstruction. *Pike* vs. *Hamilton, Ross & Co.* 191

SET-OFF.—See Provisional Sentence. 14. Partnership. 2

SHERIFF.—*Action against Sheriff for Negligence in Execution of Writ.*—Where, owing to the negligence of the Deputy-Sheriff and his messenger, goods were not attached under plaintiff's writ, which were available in satisfaction thereof: judgment was given against the Sheriff for the amount which he had failed to recover through such negligence. *Heugh & Fleming* vs. *The High Sheriff* 280

1. SHIP.—*Attachment by Edictal Citation—Owner—Registration.*—Where the registered owner of a ship had been duly summoned by edictal citations, which had been personally served, and made no appearance, the Court refused to take notice of a fact put in evidence that the ship had been sold by him by bill of sale, and that there was an endorsement on the Custom House Registry of the ship's port, to that effect, it appearing that there was some evidence of collusion between him and the purchaser. *Crozier* vs. *Browne* 5

2. —— *Contract for building ship.*—Under a contract for the building of a ship, until the ship is in deep water she is at the risk of the builders. *Murray* vs. *Roome and Sorey* 157

3. —— A ship in harbour was attached *ad fundandam jurisdictionem*, at suit of C., a creditor of the owner. While under attachment, plaintiffs, at the Captain's request, supplied the crew with provisions. The ship was sold in execution of the judgment in the above suit. The plaintiffs claimed to be paid out of the proceeds, in preference to the claim of C:—*Held*, that this claim was not preferent.

On attachment of a ship, the ship is wholly in custody of the Court; the Sheriff has entire control, and the contract between master and seamen is dissolved. (*Per* WYLDE, C. J.) *Reid* vs. *Crozier and Cloete* 183

1. SLANDER.—See Dutch Reformed Church.

2. —— *Prescription—Pleading—Evidence—Onus of proof.*—Action of damages for slander is prescribed if not brought within one year after knowledge of the slander on the part of the plaintiff.—The onus of pleading and proving that plaintiff was aware of the slander for upwards of a year after it was uttered, and that he failed to proceed, rests on defendant.—It is necessary in

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action of slander that the words spoken shall be in evidence in the language in which they are alleged in the declaration to have been uttered.—Where the words spoken were alleged in the declaration to have been spoken in Dutch, and it appeared from the evidence taken on commission that they were so spoken, but upon the evidence the words only appeared in English:—*Held*, that defendant was debarred from raising this objection at the trial, as he should have claimed that they should be taken down in Dutch by the Commissioner. *Reid* vs. *Van der Walt* 285

SUMMONS.—See Provisional Sentence.

1. SURETY, Release of.—See Provisional Sentence. 5

2. —— to Auctioneer.—See Auctioneer.

TENDER.—See Sale. 7

TITLE TO LAND.—See Grant and Diagram.

TORTIOUS CONVERSION.—See Agent. 1

TRANSFER, Action by insolvent's trustees to compel.—See Insolvency. 7

TRESPASS.—See Right of Way.

TRUSTEE.—See Insolvency. 1, 3, 4

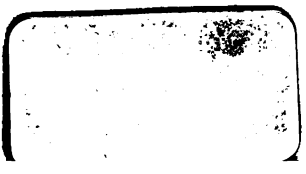
WALL.—See Party-wall.

WAY.—See Right of Way.

1. WILL.—*Codicil—Effect of husband's insolvency on property of wife married in community.*—A. executed a will bequeathing her property to her sister B., subject to a *fidei commissum* in favour of B.'s children. The will directed that after B.'s death "the entire inheritance shall devolve free and unencumbered in full and free property upon B.'s children," of whom plaintiff was one. Subsequently A. executed a codicil directing that "the inheritance devolving upon her niece (the plaintiff) married to C. shall be burthened with entail of *fidei commissum* in such manner that the usufruct or interest of the said inheritance shall not be paid to any other person" than plaintiff. C. was married to plaintiff in community of property, and at the time of execution of the codicil was an uncertificated insolvent. He was rehabilitated, but subsequently became again insolvent:—*Held*, that the trustee in this latter insolvency could not attach the interest accruing to C. under the will and codicil. *Bosman* vs. *Richter* 78

2. —— *Ord.* 15, 1845, § 3—*Initials.*—A mutual will was written upon one sheet containing two leaves (four pages). The testators and one of the witnesses signed their initials on the first leaf, the other witness signed his name: all signed their names on the second leaf:—*Held*, that the will was invalid on account of the parties not having signed their names upon every leaf in terms of Ord. 15, 1845, § 3. (BELL, J., *diss.*). *Van Vuuren* vs. *Van Vuuren* 11

3. —— *Letters of Administration—Institution of Heirs—Exception*



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of non-qualification.—Plaintiff was appointed executor under the will of A. and took out letters of administration. As executor he sued defendant to compel him to execute certain deeds of conveyance. An exception that the will was invalid on account of the non-institution of heirs and non-disposal of any property, overruled, without deciding on the validity of the will, as being incompetent whilst the letters of administration were in existence. *Mills, Anderson's Executor* vs. *Thwaits* .. 187

4. WILL.—*Prohibition of Alienation.*—Action by mortgage creditor to effect sale of immovable property prohibited to be alienated "extra familiam."—Property over which there was a mortgage-bond was bequeathed to C. for a fixed sum, with a prohibition of alienation "extra familiam," or for less than such fixed sum. Upon testator's death, C. to k over the mortgage-bond and paid the specified sum into the estate. Upon C.'s insolvency the mortgagee claimed that the property should be sold to satisfy the arrears of interest. All those interested under the will, including a curator-ad-litem appointed on behalf of unborn issue, were unwilling to take over the property for the specified sum, it having considerably deteriorated in value. THE COURT held the prohibition of alienation void, and ordered the property to be sold. *Van der Poel* vs. *Colyn.* 276

—— *Collation.*—W., married in community, by will made in 1852, directed that a certain sum due to him by his son should be brought into collation in estimating the inheritance due to his son; part of this debt was due on a bond made by the son, dated 1834. In 1849 the son became insolvent, and W. did not prove the bond in his estate, though he proved other debts. In 1853 W.'s wife died, and no notice was taken of the bond in ascertaining the amount of the maternal estate due to the son. In 1854 W. died. The son's widow claimed against W.'s executors that the bond should not be brought into collation, as there was proof of cancellation. THE COURT gave judgment for the defendants. *Wehr's Tutrix* vs. *Wehr's Executors* 297

WRIT OF ARREST.—See Arrest.

WRIT OF EXECUTION.—*Special and General Mortgage—Rule of Court* 36.—On provisional judgment being obtained upon a special mortgage-bond containing the general clause, the plaintiff may at once take out a writ of execution against defendant's movable property, although the specially mortgaged property was declared executable, according to the prayer in the summons. *Eagar* vs. *Denyssen* 140

LONDON: WM. CLOWES AND SONS, LIMITED, STAMFORD STREET AND CHARING CROSS.